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ICWA's Irony

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ICWA'S IRONY

Marcia Zug*

The Indian Child Welfare Act (ICWA or the Act) is a federal statute that protects Indian children by keeping them connected to their families and culture. The Act's provisions include support for family reunification, kinship care preferences, cultural competency considerations and community involvement. These provisions parallel national child welfare policies. Nevertheless, the Act is relentlessly attacked as a law that singles out Indian children for unique and harmful treatment. This is untrue but, ironically, it will be true if challenges to the ICWA are successful. To prevent this from occurring, the defense of the Act needs to change. For too long, this defense has focused on justifying the Act's alleged different treatment of Indian children. Now, it is time to refute this charge and demonstrate this difference is illusory.

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The Indian Child Welfare Act (ICWA or the Act) is under attack, again, and although the Act has faced numerous challenges in the past, the current attacks are different. Today's anti-ICWA arguments are focused on the Act's destruction rather than its modification. However, what is particularly extraordinary about these attacks and their recent success is that they are occurring at the same time that support for the protections and policies enshrined in the ICWA is growing.

Over the past decade, numerous states have enacted child welfare laws and policies that mirror the ICWA's most important protections.¹

1. In fact, many states have also enacted state ICWAs, including California, Colorado, Michigan, New Jersey, and Vermont, which have all enacted this legislation in the past decade. CAL. FAM. CODE § 175(c) (Deering 2007); COLO. REV. STAT. § 19-1-126 (2020); MICH. COMP. LAWS SERV. § 712B.1 (LexisNexis 2013); NEB. REV. STAT. ANN. § 43-1517 (LexisNexis 2015); N.J. STAT. ANN. § 5:10-6 (West 2020); VT. STAT. ANN. tit. 33, § 5120 (2009); WASH. REV. CODE ANN. § 13.38.010 (LexisNexis 2011); WIS. STAT. § 48.028 (2016). In addition, a state ICWA bill has been drafted in South Carolina and is awaiting

Consequently, this Article argues that the ICWA's defenders should stop trying to justify the different treatment of Indian children and families and, instead, demonstrate that the Act's protections simply ensure Indian families receive the same protections as other families.

Current attacks on the ICWA are grounded in a misunderstanding of modern child welfare law. Anti-ICWA advocates claim the Act harms Indian children by treating them differently than non-Indian children. However, what the ICWA actually does is ensure Indian children receive the same protections as non-Indian children.

Child welfare ideas have evolved drastically over the past half-century. When the ICWA was first enacted, the ideas it embraced—family preservation over termination of parental rights—were considered the best child welfare practices for all children.² Over time, ideas about children's best interests changed, and the ICWA began to conflict with new child welfare laws and policies. This conflict created the perception that the Act harms Indian children. Today, ideas regarding child welfare best practices are changing again, and modern child welfare policy substantially aligns with the ICWA. Consequently, arguments that the ICWA requires the different and harmful treatment of Indian children have no merit. Nevertheless, these claims are being used to challenge the Act's constitutionality, and courts appear increasingly receptive to such arguments.

Unfortunately, the ICWA's defenders give credence to these arguments when they seek to justify the Act's alleged different treatment of Indian families, rather than objecting to the underlying assumption of difference. As the recent case *Brackeen v. Zinke*³ demonstrates, when courts accept the claims that the ICWA requires the different treatment of Indian and non-Indian children, they may be more inclined to view the Act as harmful and more willing to find it unconstitutional. Consequently, it is imperative to change the narrative surrounding the ICWA and challenge the idea that the Act mandates the different and harmful treatment of Indian children.⁴

presentation to the state legislature. See A Bill to Enact the South Carolina Indian Child Welfare Act (n.d.) (on file with author).

2. See *infra* Section I.A (discussing the history of the ICWA).

3. 338 F. Supp. 3d 514 (N.D. Tex. 2018).

4. One of the ironies of this argument is that the Act is commonly cited as the “gold standard” in child welfare law. See, e.g., Danielle J. Mayberry, *The Origins and Evolution of the Indian Child Welfare Act*, 14 JUD. NOTICE 34, 45 (2019) (“For over forty years, the ICWA has been called the ‘gold standard’ of child-welfare policy due to its emphasis on

A successful ICWA defense must establish that the Act is not just a legally permissible exercise of Congress's plenary power over Indian tribes, but that it is also morally permissible. As long as the argument that the Act encourages the harmful treatment of Indian children remains viable, the ICWA's future is imperiled. It is, therefore, vitally important to demonstrate that the Act does not harm Indian children; the best way to do this is to show that the ICWA's provisions closely align with the child welfare policies applicable to non-Indian children. Accordingly, the purpose of this Article is twofold. First, it seeks to explain why the ICWA is under attack and, second, to demonstrate why these attacks are unjustified.

Part I of this Article will describe the recent history of child welfare policy and show how ideas regarding children's best interests have fluctuated between the divergent goals of reunification and termination. It will describe how the ICWA originally aligned with accepted notions of best practices in the child welfare context but then diverged and that this divergence is the basis for current ICWA challenges.

Part II will discuss recent challenges to the ICWA. It examines the *Brackeen* Court's decision finding the Act unconstitutional, the Fifth Circuit's reversal, and the arguments and defenses used in these types of ICWA challenges. This Part argues that relying on federal Indian law precedent to uphold the Act is an increasingly dangerous strategy and suggests that ICWA advocates must do more to address and debunk the

placing children with relatives as the foremost goal.”); *see also* Pledge to Defend ICWA, Nat'l Cong. of Am. Indians SD-15-011, 2015 Gen. Assemb., Ann. Sess. (2015), <http://www.ncai.org/resources/resolutions/pledge-to-defend-icwa> (“WHEREAS, a coalition of leading national child welfare organizations have declared ICWA to be a ‘gold standard’ for child welfare because as ICWA mandates, it is in every child’s best interest to be protected from harm and to prevent the unnecessary trauma that occurs when children are removed from their family, culture, and community”). The eighteen organizations of this coalition can be found in the Casey Family Programs’ press release. Press Release, Casey Fam. Programs, 18 National Child Welfare Organizations Join Supreme Court Amicus Brief in Support of Indian Child Welfare Act (Apr. 11, 2013), <https://www.casey.org/media/ICWA-PR-FINAL-1.pdf>; *see also* Letter from Nat’l Indian Child Welfare Ass’n to Elizabeth Appel, Off. of Regul. Affs. & Collaborative Action, Indian Affs., U.S. Dep’t of the Interior (May 18, 2015), <https://perma.cc/D8HJ-6YYC> (citing amicus brief of Casey Family Programs, Child Welfare League of American, Children’s Defense Fund, Donaldson Adoption Institute, North American Council on Adoptable Children, Voice for Adoption, and twelve other child welfare organizations, all noting that “ICWA has been deemed the ‘gold standard of child welfare practice’ by mainstream organizations”).

perception that ICWA treats Indian children different from and worse than non-native children.

Part III demonstrates that views regarding child welfare best practices are shifting once again and increasingly align with the ICWA. This Part examines the most challenged and controversial provisions of the Act and shows how they parallel current state and federal child welfare policy.

I. From Reunification to Termination

In the mid-twentieth century, child welfare practice was based on a child rescue philosophy.⁵ During this period, child welfare agencies made little effort to prevent the breakup of families. Instead, the focus was on ensuring children were removed from unsafe homes.⁶ This policy was well-intentioned, but the result was catastrophic. Children were doomed to years of foster care with little or no hope of ever receiving a permanent home.⁷ In the 1970s, child protection experts and national panels began arguing that the emphasis on child removals was not working and that both children and their parents were frequently harmed by prolonged separations.⁸ These child advocates cited the growing numbers of children in foster care as proof that child welfare policy needed to change.⁹ They then recommended a three-pronged reform program that would discourage removals, aid

5. See Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 254–55 (1989-1990) (“Child welfare practice in the United States prior to the passage of [the Adoption Assistance and Child Welfare Act of 1980] was largely based on a child rescue philosophy, with little focused effort made by agencies to prevent the breakup of families and a child's subsequent placement into foster care.”)

6. *Id.* at 255.

7. *Id.* at 224 (describing the five years of congressional testimony covering the harms of removal and the United States’ “dysfunctional child welfare system”); see also Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324–25 (2005) (describing the five years of congressional testimony “that highlighted the fact that a staggering number of children—500,000 or more—were currently residing in foster care” and the fact that children were frequently “moved from one foster family to another while waiting, sometimes for their entire childhoods, for the child protection agency to decide whether they should be reunited with their parents or whether alternative permanent plans should be implemented”).

8. See *supra* note 7.

9. By 1979, there were almost half a million children in foster care. Linda Lee Reimer Stevenson, Comment, *Fair Play or a Stacked Deck?: In Search of a Proper Standard of Proof in Juvenile Dependency Hearings*, 26 PEPP. L. REV. 613, 614 (1999).

rehabilitation, and seek reunification whenever possible.¹⁰ These recommendations were quickly embraced.

A. The Family Preservation Movement

By the 1980s, support for family preservation gained widespread acceptance and laws and policies were enacted to identify children “at risk of placement” and prevent them from being removed from their families and sent to foster care.¹¹ One family preservation policy adopted by many states was Intensive Family Preservation Services (IFPS). IFPS was premised on the belief that many child abuse and neglect cases resulted from a crisis in the family and could be addressed by providing families with intensive, short-term support services.¹²

In 1974, the first IFPS program, called Homebuilders, was created.¹³ It then became a model for other IFPS programs and by 1992, the majority of states had enacted their own versions of the Homebuilders program.¹⁴ Such programs were important wins for advocates of family preservation, but the

10. These experts urged

that public authorities should: 1) not place a child in foster care unless her parents were so inadequate that the problems were impossible to resolve in the home; 2) if foster care was required, work seriously and intensively toward family reunification for a planned period; and, 3) if reunification efforts failed, terminate the parent’s rights and place the child in a stable adoptive home.

Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 590 (2005).

11. See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 896 (2009) [hereinafter Bartholet, *The Racial Disproportionality Movement*].

12. Claire Houston, *What Ever Happened to the “Child Maltreatment Revolution”?*, 19 GEO. J. GENDER & L. 1, 32–33 (2017) (noting the goal of IFPS was to make the “home safe for children by providing families with intensive services (a mix of counseling, skills training, and help with basic needs) over a short period of time”); see also Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 582 (2015) (criticizing IFPS as based on the incorrect assumption that child maltreatment was typically a short-term crisis) [hereinafter Bartholet, *Differential Response*].

13. See, e.g., JOAN BARTHEL, FOR CHILDREN’S SAKE: THE PROMISE OF FAMILY PRESERVATION 14–15 (1992); JILL KINNEY, KEEPING FAMILIES TOGETHER: THE HOMEBUILDERS MODEL (1991) (describing the Homebuilders model).

14. Houston, *supra* note 12, at 33. “Large foundations, such as the Edna McConnell Clark Foundation, funded and promoted IFPS, and the CDF and CWLA supported IFPS as an important child protection strategy.” *Id.*

biggest victory was the passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA).¹⁵

When the AACWA was passed, it was called “the most significant legislation in the history of child welfare.”¹⁶ The purpose of the AACWA was to ensure family preservation became the basis of child protection law and to avoid the harms caused by long-term foster care placement.¹⁷ One of the AACWA’s most important reforms was the requirement that states demonstrate “reasonable efforts” had been made to prevent removal of children from their parents and, if removal was deemed necessary, that the state had also made reasonable efforts to help the parents address the problems that led to removal.¹⁸ Under the AACWA, alternative placements, such as adoption, could only be considered if preservation services failed and returning the child was deemed unsafe.¹⁹ The AACWA enforced its requirements by tying federal foster care funding to states making “reasonable efforts” to maintain and reunify families.²⁰

15. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.); Houston, *supra* note 12, at 33.

16. Houston, *supra* note 12, at 33 (quoting RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* 93 (1997)) (internal quotation marks omitted).

17. *See, e.g.*, Bean, *supra* note 7, at 325 (explaining that “In response to these [foster care] and related concerns, AACWA was designed with a focus on family preservation and reunification”); Sherry A. Hess, Comment, *Texas Family Code Section 263.401: Improving the Mandatory Dismissal Deadline to Be Truly in the Best Interest of the Child*, 9 TEX. WESLEYAN L. REV. 95, 101 (2002) (noting the AACWA is primarily based on a family preservation philosophy).

18. *See* Adoption Assistance and Child Welfare Act, sec. 101, § 471(15), 94 Stat. at 503 (requiring that “reasonable [reunification] efforts” be made “(A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.”) Eventually this requirement would be viewed as an impossible balancing act where “states were expected to keep children safe while keeping them with abusive parents.” Houston, *supra* note 12, at 33; *see also* Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 73–75 (2012) (describing the backlash against the family preservation policies of the AACWA).

19. *See* Garrison, *supra* note 10, at 590–91; Stevenson, *supra* note 9, at 614–15; *see also* Hess, *supra* note 17, at 100–01 (describing the success and failure of the AACWA).

20. 42 U.S.C. § 671(a)(15). The statute states that “[i]n order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary” providing that in each case, reasonable efforts will be made “prior to the placement of a child in foster care, to prevent or eliminate the need” for removal of the child from his home, and “to make it possible for a child to safely return to the child’s home.” *Id.* § 671(a). Federal funds were

The ICWA²¹ was enacted two years before the AACWA.²² The ICWA's immediate goal was to end discrimination against Indian families,²³ but it also sought to provide these families with additional protections grounded in emerging ideas about family preservation and child welfare best practices.²⁴ Consequently, it is not surprising that many of the AACWA's

made available to help welfare workers keep children with their families or, if they had been removed, help them return home. S. REP. NO. 96-336, at 4 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 1448, 1453. In addition, the AACWA required the development of a case plan to help "improve family conditions and facilitate returning the child to his home." H.R. REP. NO. 96-900, at 46 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 1561, 1566. Reasonable efforts under the Act included preventative services, providing periodic case review, and services to reunite children with their parents. *See* Garrison, *supra* note 10, at 590-91.

21. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended in scattered sections of 25 U.S.C.).

22. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

23. Before the ICWA, state child welfare agencies routinely singled Indian families out for different treatment. *See* H.R. REP. NO. 95-1386, at 10-11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533 [hereinafter 1978 HOUSE REPORT]. Indian children were removed at significantly higher rates than non-Indian children and their parents were given fewer resources and opportunities to regain custody of their children after removal. *See id.* at 9; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,780 (June 14, 2016); *Indian Child Welfare Act of 1978: Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 95th Cong. (1978) [hereinafter 1978 Hearings] (describing how Indian children face disproportionate high rates of family separation and removal); *Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. (1977) [hereinafter 1977 Hearings] (same); *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong. (1974) [hereinafter 1974 Hearings] (same). American Indian families were also less likely than non-Indian families to receive supportive services as an alternative to removal of their children. *See* 1978 Hearings, *supra*, at 36 (regarding "active efforts"); 1977 Hearings, *supra*, at 29. During this time, approximately 25-35% of all Indian children were being removed from their parents and placed in foster care. 1978 House Report, *supra*, at 9; *see also* Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 24 (1998) (stating that "[c]onservative estimates indicated that one-third of all American Indian children were being separated" from their parents in the years preceding the passage of the ICWA). In some states, the rates were higher. For example, "Minnesota, Montana, South Dakota, and Washington had American Indian placement rates that were five to nineteen times greater than that of the non-Indian rate" and in Wisconsin, the rate was "1600 times greater." *Id.*

24. The Act protects Indian families by delineating a set of procedural and substantive standards for Indian child custody proceedings. 25 U.S.C. §§ 1911-1923. These regulations

provisions parallel the ICWA's.²⁵ This similarity shows the ICWA was not an isolated piece of legislation proscribing different rules for Indian families. Rather, the ICWA was part of a national family preservation movement aimed at protecting all children, both Indian and non-Indian, from unnecessary removals, prolonged separations, and preventable terminations.²⁶

B. The Family Preservation Backlash

The support for family preservation enshrined in the AACWA did not end with the law's passage. In the decade after the AACWA's enactment, states continued to institute IFPS programs and support family preservation policies.²⁷ However, there was also a growing fear that the intense focus on family preservation might be hurting children.²⁸ Much of this fear stemmed

include protections to safeguard the interests of Indian parents as well as others intended to protect the best interests of Indian children. *See, e.g., id.* § 1912(a), (b), (d) (requiring parental notice, appointment of counsel and the provision of remedial services in involuntary termination proceedings); *id.* § 1913(d) (allowing any party to a child custody proceeding to withdraw their consent to adoption and invalidate the adoption if the consent was obtained through fraud or duress); *id.* § 1915(a) (giving preference to placements with the child's family). A handful of these regulations were unique to the Indian child welfare context. *See, e.g., id.* § 1911(b) (requiring transfer to tribal court in many circumstances). However, the majority of the ICWA's provisions were similar to the child welfare practices and policies that were gaining national support at the time of the Act's passage.

25. In fact, the ICWA's provision may have served as a model for the AACWA. *See, e.g.,* CATHLEEN A. LEWANDOWSKI, CHILD WELFARE: AN INTEGRATIVE PERSPECTIVE 40 (2018) (noting that the "ICWA[s] . . . passage may have inspired further child welfare legislation, beginning with passage of AACWA . . ." and that both statutes "emphasized that children's own families could best meet the children's needs"); *see also* Jordan Blair Woods, *Unaccompanied Youth and Private-Public Order Failures*, 103 IOWA L. REV. 1639, 1667 n.168 (2018) ("[T]he AACWA was not the first legislative response that Congress made to growing concerns in the 1970s surrounding foster care and adoption.").

26. Woods, *supra* note 25 (describing ICWA as a precursor to AACWA); *see also* Christine Diedrick Mochel, Comment, *Redefining "Child" and Redefining Lives: The Possible Beneficial Impact the Fostering Connections to Success Act and Court Involvement Could Have on Older Foster Care Youth*, 40 CAP. U. L. REV. 517, 530 (2012) (citing ICWA and AACWA as part of the "large amounts of legislation dealing specifically with the removal, placement in foster care, and subsequent adoptions of abused children").

27. *See, e.g.,* Houston, *supra* note 12, at 33 ("[B]y 1992, nearly thirty states had replicated the program."); Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 139 (2001) (describing IFPS programs in Michigan since 1988 and in Alabama shortly thereafter).

28. Such shifts are common. As Professor Catherine Ross has noted, "The pendulum of child welfare reform has repeatedly swung between efforts to preserve troubled families at

from the apparent failure of policies aimed at addressing child maltreatment. These policies included mandatory child abuse reporting laws, expanded child protection services, and increased criminal justice intervention in child maltreatment cases.²⁹ When these changes failed to curtail the rising tide of child abuse cases,³⁰ anti-child abuse advocates began blaming family preservation policies and the provisions that made it harder to remove children.³¹ These concerns were then reinforced by the Supreme Court's decision in *Santosky v. Kramer*, holding that parents have

virtually all costs and a passion to rescue every child in need." Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 194 (2004); see also Houston, *supra* note 9, at 34 ("States and local governments were re-directing funds from more traditional child protection services to IFPS. And in 1993, with support from the Edna McConnell Clark Foundation, Congress passed the Family Preservation and Support Services Act of 1993, which earmarked \$1 billion for state family preservation efforts.").

29. Other reforms from this period included laws requiring suspected child abuse fatalities to be reported directly to district attorneys and/or medical examiners or coroners, cross-reporting laws requiring CPAs to report sexual abuse or "serious" physical abuse to law enforcement, and changes to state and federal laws increasing the ability of children to testify in child abuse cases or have their evidence admitted in another form. Houston, *supra* note 12, at 29. As Claire Houston has noted, during this period

[p]olice departments established specialized teams to investigate child abuse reports, and prosecutors' offices developed specialized units to prosecute these cases. Prosecutors also developed strategies . . . to improve the child abuse prosecution rate. In many communities, Child Advocacy Centers (CACs) were established to provide multidisciplinary investigation of criminal child abuse and support child witnesses. At the federal level, Congress passed the Children's Justice and Assistance Act, which allocated funding to states to improve the investigation and prosecution of child abuse cases. Finally, CAPTA was amended to encourage states to facilitate multidisciplinary and interagency child abuse investigations.

Id. at 29–30.

30. *Id.* at 29 ("By 1985, the number of reports to CPAs had swelled to 1.5 million, of which 500,000 were substantiated for maltreatment.").

31. See, e.g., Houston, *supra* note 12, at 34 (describing the critics of family preservation and the AACWA); John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 459 (2008) ("In the 1990s . . . critics argued that over-reliance on family preservation sometimes led to tragedy."); Wexler, *supra* note 27, at 143 ("'[F]amily preservation' became the scapegoat whenever any child was left in any home under any circumstances and something went wrong – regardless of whether the child had been anywhere near a real family preservation program.").

a constitutional right to family preservation, even in cases involving child maltreatment.³²

Santosky involved a challenge to New York's civil child abuse law, which permitted the termination of parental rights if a court determined, based on "a preponderance of the evidence," a child had been "permanently neglected."³³ The Santoskys claimed this low evidentiary standard violated their parental rights, and the Supreme Court agreed. According to the Court, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."³⁴ The Court explained that until unfitness is proven, it must be assumed that parents and their child speak with one voice and share an interest in preventing termination.³⁵ After *Santosky*, a state needed to demonstrate "clear and convincing" evidence of neglect before it could terminate parental rights.³⁶

Santosky was a win for family preservation. However, the case troubled child protection advocates, many of whom were already concerned about the effects of family preservation policies on rates of child abuse. These advocates feared that, by making it more difficult for states to terminate parental rights, the *Santosky* Court had increased the likelihood "that children [would be] return[ed] to the care of maltreating parents."³⁷ One of the most prominent of these critics was Richard Gelles, the author of the popular book *The Book of David: How Preserving Families Can Cost Children's Lives*.³⁸

32. 455 U.S. 745, 747–48 (1982), cited in Houston, *supra* note 9, at 33.

33. *Santosky*, 455 U.S. at 774.

34. *Id.* at 755.

35. *Id.* at 760 ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); see also Ross, *supra* note 28, at 184 ("[O]nly after the State proves parental unfitness, are the interests of parent and child deemed to 'diverge.'"). The fiction of this assumption was emphasized by the fact that one of the children, "who had been removed from his parents when he was only three days old, was seven when the case was argued and had never lived with his parents" and thus could not be assumed to share their interests. "Yet even on those facts, the Court preserved the legal fiction" *Id.*

36. *Santosky*, 455 U.S. at 747–48.

37. Houston, *supra* note 12, at 33–34.

38. GELLES, *supra* note 16.

Gelles' book recounted numerous stories of children returned to their families who then experienced further abuse and, in some cases, death.³⁹ Gelles argued these tragedies were the result of family preservation laws and policies, which forced social workers and courts to return children to their biological families even when such return endangered the children's lives.⁴⁰ According to Gelles, "the basic flaw of the child protection system is that it has two inherently contradictory goals: protecting children and preserving families."⁴¹ Gelles believed family preservation policies were antithetical to children's rights, and other child welfare advocates soon adopted this view.

Throughout the 1980s and early 1990s, increasing numbers of child welfare advocates challenged the *Santosky* Court's position that children—particularly abused children—should be assumed to share the same interests as their abusing parents. These advocates considered such assumptions dangerous, and they sought legal reforms requiring courts and child welfare agencies to focus on children's needs as separate from their family's needs.⁴² In making these arguments, child welfare advocates relied heavily on the "psychological parent" theory of Joseph Goldstein, Anna Freud, and Albert J. Solnit.⁴³ According to this theory, "[w]hether any adult becomes the psychological parent of a child is based . . . on day-to-day interaction, companionship, and shared experiences."⁴⁴ Consequently, "[t]he role can be fulfilled either by a biological parent . . . or by any other caring adult."⁴⁵ The psychological parent theory supported child welfare advocates' position that if a child cannot return home quickly, the best alternative is to

39. *Id.*; see also Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 647 (1999) (noting the numerous cases of children returned to abusing parents).

40. GELLES, *supra* note 16, at 152.

41. *Id.*

42. Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV. 1079, 1092–93; Houston, *supra* note 12, at 34.

43. JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* (1986) (regarding the role of child professionals in child placement decisions); JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) (addressing the grounds for intervention); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS*].

44. GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS*, *supra* note 43, at 19.

45. *Id.*

sever the child's "ties with their biological family and formalize attachments to the current caregivers."⁴⁶

During this period, many legal scholars also became ardent opponents of family preservation policies. One prominent critic was Professor Elizabeth Bartholet, who forcefully challenged the idea that family preservation policies serve children's interests and suggested that "children would generally be better served by policies encouraging child protection workers to intervene earlier and more often to remove victimized children from maltreating parents, to terminate parental rights, and to place children in adoption."⁴⁷ Professor Bartholet and other family preservation critics recognized that their approach, which favored permanent removal over reunification, could create unfairness to parents; however, they argued that any potential unfairness was outweighed by the benefits.⁴⁸ Ultimately, these

46. Katz, *supra* note 42, at 1093. Other medical and scientific research also seemed to support this position. For example, in a 1996 article, Dr. Amy Henegan and her colleagues advised:

[M]ore attention should be directed toward determining whether the child's overall functioning has improved because of the services received. Has abuse or neglect reoccurred? Have the child's growth and development been optimized? Has the child's cognitive and social development shown changes for the better? These and other outcomes will need to be addressed to obtain a clearer understanding of the benefits and limitations of family preservation Alternatives to family preservation, such as permanency planning (adoption) and foster care, also must be reexamined Applying family preservation to every family, as a matter of policy, may actually be placing children at risk.

Amy M. Heneghan et al., *Evaluating Intensive Family Preservation Programs: A Methodological Review*, 97 PEDIATRICS 535, 541 (1996); see also 2 WESTAT ET AL., EVALUATION OF FAMILY PRESERVATION AND REUNIFICATION PROGRAMS: FINAL REPORT 9-1 (2002), <https://aspe.hhs.gov/system/files/pdf/180326/report2.pdf> (finding no evidence that families receiving IFPS were better able to avoid foster care placement). *But see* Wexler, *supra* note 27, at 136–37 (concluding that at least one of these studies was defective on numerous grounds and thus unreliable).

47. Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323, 1325 (2012) (citing her book ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999) [hereinafter BARTHOLET, NOBODY'S CHILDREN]).

48. Gordon, *supra* note 39, at 657 ("Even when it is possible to prioritize children in a general way, putting them first in specific situations is often 'difficult and painful.' It is difficult because adults do not have children's needs and cannot easily see what they are. It is painful because what is good for children may be unfair to adults.") (footnote omitted)

arguments persuaded Congress and, in 1997, the Adoption and Safe Families Act was passed.⁴⁹

C. ASFA

When the Adoption and Safe Families Act of 1997 (ASFA)⁵⁰ was enacted, nearly half-a-million children were in foster care.⁵¹ Foster care was designed as a temporary solution; however, by this time, it had become increasingly clear that substantial numbers of foster children would never rejoin their parents. Many child welfare advocates blamed family reunification policies for this predicament.⁵² They claimed that the emphasis on reunification had doomed these children to either a childhood in foster care⁵³ or to the repeated dangers of an unsafe familial home.⁵⁴ The

(quoting JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 81 (1996)).

49. 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997).

50. Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

51. DONALD DUQUETTE & MARK HARDIN, U.S. DEP'T OF HEALTH & HUMAN SERVS., *GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN I-7* (1999).

52. See, e.g., Allison E. Korn, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL'Y & L. 293, 336 (2016) (noting such advocates “blamed the foster care surge on ideas of family preservation and an emphasis on reunification of children in foster care with their families”). See generally BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 47 (arguing that the policy of family preservation is flawed, that it fails to keep children with their families and instead, subjects them to years of harmful foster care).

53. See, e.g., Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 128 (1999–2000) (“Family preservation policies were blamed both for arbitrarily returning children to violent homes and for inflating the foster care population.”).

54. Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63, 66 (1999) (“The congressional testimony and newspaper articles during the pre-ASFA hearings emphasized cases of children who were returned home and killed.”); see also 143 CONG. REC. H10776-05, H10789 (daily ed. Nov. 13, 1997) (statement of Rep. Pryce). When lobbying for the ASFA’s passage, “one senate member told Congress the story of extreme abuse of an eight year old boy by his aunt in October 1997.” Kathleen A. Bailie, Note, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2292 (1998).

Using this tragedy as an example of the danger of the family preservation philosophy, the senator remarked: “Don’t we have to ask . . . what on Earth was that woman doing taking care of that child? Why in the world was that child put back into that same home, put back with that abusive woman?”

ASFA's remedy was to encourage speedy terminations and adoptions.⁵⁵ The law's supporters believed this would prevent children from being returned to unsafe familial homes while also helping them find safe and loving adoptive families.⁵⁶

The ASFA reflected changed ideas about children's best interests.⁵⁷ By the time it was enacted, most advocates favored a child-centered approach to child welfare. They emphasized children's rights over parental rights⁵⁸ and believed previous reunification policies, particularly the AACWA, protected parents' rights at the expense of their children.⁵⁹ This shifting view of child welfare is apparent in the discussion surrounding the ASFA's passage. For example, in explaining his support for the ASFA, Senator Mike DeWine said, "[W]e have to start worrying [more] about the children's rights and less about the rights of the natural parents."⁶⁰ Similarly, Rep. Steny Hoyer said, "[O]ur child welfare system too often protects parents' rights rather than children's rights."⁶¹ The ASFA was a clear reversal of this prior policy.

The ASFA favored adoption over reunification and did so in two particular categories of cases. First, the ASFA favored adoption in cases where a court could make an early determination that it would be unsafe for the child to return home due to "aggravated circumstances," such as severe abuse. Second, it favored adoption in the cases of children who have "been

Id. at 2292–93 (alteration in original).

55. Garrison, *supra* note 10, at 591–92 ("In order to curb growth of the foster care population, ASFA mandates parental rights termination if a child has been in state care for fifteen of the past twenty-two months.").

56. *Id.* (noting ASFA was touted as the as the best and possibly only means "to curb the human and public costs of prolonged foster care").

57. This change is reflected in the guidelines issued by the Department of Health and Human Services for implementing ASFA which were "developed by a cross-disciplinary group of experts in child welfare, comprised of administrators, lawyers, judges, advocates and front-line workers" and "reflect their best thinking about child welfare policy frameworks and what ought to be." DUQUETTE & HARDIN, *supra* note 52, at i (quoting Carol Williams, Assoc. Comm'r, Dep't of Health & Human Servs.), *quoted in* Ross, *supra* note 28, at 196 n.87.

58. See Bartholet, *The Racial Disproportionality Movement*, *supra* note 11, at 928 (describing the ASFA as a "good law because it shifts the balance in child welfare law and policy somewhat in the direction of valuing children's rights more, and parents' rights less"). See generally Yablon-Zug, *supra* note 18 (describing the shift from the AACWA to ASFA).

59. See Yablon-Zug, *supra* note 18.

60. 143 CONG. REC. S3947-02 (daily ed. May 5, 1997).

61. 143 CONG. REC. H2021 (daily ed. Apr. 30, 1997).

in foster care under the responsibility of the State for 15 of the most recent 22 months.”⁶² In both types of cases, the ASFA promotes adoption by reducing the amount of time a child spends in foster care while waiting to reunite with his or her birth parents. To that end, the statute also states that “reasonable efforts” are often not required in cases of abuse and neglect,⁶³ and that permanency hearings must be scheduled after twelve months, lessening the time period for reunification efforts to have an effect.⁶⁴ As

62. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, § 103(a)(3)(E), 111 Stat. 2115, 2118 (codified as amended in various sections of 42 U.S.C.).

63. Under the ASFA,

states are *not* required to use reasonable efforts to preserve or reunify families in cases where the child had been subject to “aggravated circumstances.” Aggravated circumstances are defined by state law, and may include abandonment, torture, chronic abuse, or sexual abuse. States may also forego reasonable efforts in cases where a parent has been convicted of murder or voluntary manslaughter of another child or felony assault resulting in serious bodily injury to the child or another child, or where parental rights to a sibling have been terminated involuntarily.

Houston, *supra* note 9, at 35.

64.

[T]he 1997 Act specifies a twelve-month period for the state to hold a permanency hearing. This shorter period of time lessens the opportunity for any beneficial results from state reasonable efforts expended to reunite the family; concomitantly, the shorter time frame lessens the time that a child will spend in foster care while waiting for parental conduct to improve.

Raymond C. O’Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. ST. L. REV. 1029, 1044. In addition,

ASFA also requires states to file a petition to terminate parental rights where a child has been in foster care for fifteen of the last twenty-two months, or where a child has been removed from the home and a court finds that the parent has committed murder or voluntary manslaughter of another child or felony assault resulting in serious bodily injury to the child or another child.

Houston, *supra* note 9, at 35; *see also* Laura Grzetic Eibsen & Toni J. Gray, *Dependency and Neglect Appeals Under C.A.R. 3.4*, COLO. LAW., Oct. 2007, at 55, 55 (“The federally mandated reasonable efforts requirement underwent a transformation whereby the focus on reunification was broadened to place greater emphasis on the health and safety of the child. Furthermore, the Adoption and Safe Families Act of 1997, with its mandate to place children in permanent homes as soon as possible, recognized ‘the important element of time.’ Thus, there was a shift in focus from family reunification *per se* to ‘time-limited family reunification services.’”).

Ohio Senator Mike DeWine noted, the ASFA represented a “historic change” in federal child welfare law.⁶⁵

Courts interpreting the ASFA also recognized that the legislation represented a seismic shift in child welfare policy. For example, when the Iowa Supreme Court first applied the law, the court spoke of the “transformation” it represented and how “the family preservation concept which guided our general national policy for the last two decades [is now] found to be detrimental to children in some cases.”⁶⁶ Similarly, a Delaware family court described the ASFA’s “departure in philosophical focus from [AACWA]”⁶⁷ explaining “that the safety of the child and the child’s need for permanency are [ASFA’s] foremost concerns, as opposed to the inherent rights of the biological parents.”⁶⁸ In addition, the Pennsylvania Superior Court noted that the ASFA “make[s] clear that the health and safety of the child supersede all other considerations.”⁶⁹

As these courts understood, the ASFA encourages speedy terminations and adoptions and assumes family preservation is often contrary to

65. See 143 CONG. REC. S12668, S12670 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine).

66. *In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000).

67. Bean, *supra* note 7, at 335 (quoting *In re Rasheta D.*, No. 98-08-07-TN, 2000 WL 1693157, at *20 (Del. Fam. Ct. Mar. 2, 2000)); see N.J. Div. of Youth & Fam. Servs. v. A.R.G., 824 A.2d 213, 233 (N.J. Super. Ct. App. Div. 2003), *aff’d in part, modified in part and remanded sub nom.* N.J. Div. of Youth & Family Servs. v. A.R.G., 845 A.2d 106 (N.J. 2004) (rejecting mother’s argument that the agency had not made reasonable efforts to keep the daughter in the home and finding, based on ASFA that such efforts were not on the health and safety of the child). Similar remarks were made by the New Jersey Supreme Court which described the statute as having “limit[ed] the reasonable efforts social service agencies must undertake to reunite families.” *In re Guardianship of DMH*, 736 A.2d 1261, 1273 (N.J. 1999).

68. Bean, *supra* note 7, at 335 (quoting *In re Rasheta D.*, No. 98-08-07-TN, 2000 WL 1693157, at *20 (Del. Fam. Ct. Mar. 2, 2000) (alteration in original)).

69. *In re Lilley*, 719 A.2d 327, 333 (Pa. Super. Ct. 1998); see *In re Guardianship of DMH*, 736 A.2d at 1273. Post-ASFA courts viewed ASFA as a directive to interpret the “reasonable” in “reasonable efforts,” in a manner that would allow “agency reunification efforts [to] qualify as reasonable more quickly and easily than” prior to the ASFA’s passage. Bean, *supra* note 7, at 334 (noting that the primary way in which courts lessened the reasonable reunification efforts requirement was by focusing “on the health and safety of the child,” which courts perceived as the ASFA’s overriding concern); see also *State ex rel. Child., Youth & Fams. Dep’t*, 47 P.3d 859, 864 (N.M. Ct. App. 2002) (describing the statute as having “unquestionably had an impact on what is regarded as a reasonable effort.”).

children's best interests.⁷⁰ Thus, the ASFA created a problem for the ICWA and its supporters. After the ASFA's enactment, the ICWA no longer aligned with state and federal child welfare policies. Indian children were exempt from the direct application of the statute, but its passage indicated that the policies of family preservation and reunification, the policies undergirding the ICWA, were harmful.

Current ICWA challenges are based on this history and the continuing perception that the ICWA contradicts child welfare best practices. However, these cases ignore the fact that child welfare practices are changing once again and that these practices increasingly reject the ASFA's policies of speedy termination and adoption.

D. Post-ASFA

Today, the ASFA is subject to significant disapproval,⁷¹ and many of its most important ideas are no longer considered best practices.⁷² There is also mounting evidence that the ASFA is particularly harmful for children of

70. The statute provides significant adoption subsidies while giving little encouragement to relative placements or other non-adoptive options. A child being cared for by a relative is one of the few exceptions to the speedy termination requirements. However, as Professor Josh Gupta-Kagan has noted, there was no preference for kinship care or push to place with relatives in the first instance which meant that the termination exception would not apply even if there were relatives willing to receive the child. In addition, although ASFA defined guardianship's place as a permanency option, it was clearly not preferred, and the Act provided no funds for guardianship subsidies. See Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 33 (2015) ("ASFA expanded adoption subsidies, creating new adoption incentive payments that would flow directly to state governments that increased the number of foster child adoptions."); see also Ernestine S. Gray, *Judicial Viewpoints on ASFA*, 29 CHILD L. PRAC. 62, 63 (2010) (discussing the lack of encouragement for the other options).

71. See, e.g., Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 573 (2019) ("ASFA simply adopts the problems of its predecessors and weakens the few protections . . ."); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 113 (2002) (arguing that ASFA's emphasis on adoption is harmful to children and perpetuates a racist and overly-punitive child welfare system); Wexler, *supra* note 27 (arguing that ASFA has made children less safe and primarily targets poor families).

72. See, e.g., Rachel Leigh, Note, *Analyzing the Special Needs Designation and Accommodation of Parental Racial Preferences in Adoption*, 22 J. GENDER RACE & JUST. 375, 392 (2019) ("[T]here are many critics to ASFA, claiming it goes too far in the direction away from family preservation."); see also Trivedi, *supra* note 71, at 566 (describing "a shift away from ASFA back towards family preservation and reunification").

color.⁷³ Multiple studies demonstrate that African American children enter and remain in foster care in numbers disproportionate to their percentage of the general population.⁷⁴ Moreover, as Professor Tanya Washington has noted, not only do these children enter foster care at higher rates, but “children of color [also] tend to receive fewer services, stay in care longer, and generally have worse outcomes than white children.”⁷⁵

This over-representation problem is similar to that which spurred the passage of the ICWA and is one of the reasons why state and federal child welfare policies are reembracing family preservation.⁷⁶ The renewed interest in family preservation is further encouraged by emerging research demonstrating the importance of kinship care, cultural competency, and community support.⁷⁷ Still, despite the fact that state and federal support for family preservation is growing, challenges to the ICWA are simultaneously becoming more frequent and more alarming.

II. The ICWA Challenges

For over four decades, the ICWA has been subject to legal challenges. Initially, these challenges tended to accept the Act as generally beneficial but claimed that its application to a particular case or set of cases would be unjust.⁷⁸ Over time, this has changed. Today's challenges focus on eliminating the Act in its entirety and assume the Act is primarily harmful.

73. See Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 19–20 (2009).

74.

Nationally, African-American children made up less than 15 percent of the overall child population in the 2000 census, but that they represented 27 percent of the children who entered foster care during the fiscal year 2004, and they represented 34 percent of the children remaining in foster care at the end of that year.

U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE 7 (2007), *quoted in* Gray, *supra* note 70, at 63.

75. Gray, *supra* note 70, at 63.

76. See *infra* Part III.

77. See *infra* Part III.

78. Although the Act is widely considered one of the most important pieces of federal Indian legislation, proving the ICWA's success is difficult. Judicial exceptions and agency non-compliance, see *infra* notes 183–184, 191 and accompanying text, are among the reasons it is often so difficult to determine the success of the ICWA. Nevertheless, even with these obstacles there is significant evidence that ICWA is serving its congressional purpose.

A. Early ICWA Challenges

*Mississippi Band of Choctaw Indians v. Holyfield*⁷⁹ was the Supreme Court's first ICWA case. *Holyfield* involved section 1911(a) of the ICWA, which states that tribes have exclusive jurisdiction over cases involving reservation-domiciled Indian children, so such cases must be transferred to tribal court.⁸⁰ In *Holyfield*, the Indian parents were both domiciled on the reservation, but the mother left the reservation to give birth and then placed her twin babies for adoption with a non-Indian couple.⁸¹ The potential adoptive parents were fit and loving⁸² and, under state law, the adoptive placement would have been permissible.⁸³ However, because the case was governed by the ICWA, the state court lacked jurisdiction⁸⁴ and the Tribe had exclusive jurisdiction to determine the children's placement.⁸⁵ The Holyfields challenged the Tribe's exclusive jurisdiction and argued that permitting the Tribe to determine the children's placement was contrary to the children's best interests.⁸⁶

See Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 508 (2017) ("[T]he assessments to date indicate that ICWA, when properly implemented, achieves its goals.") (citing Gordon E. Limb et al., *An Empirical Examination of the Indian Child Welfare Act and Its Impact on Cultural and Familial Preservation for American Indian Children*, 28 CHILD ABUSE & NEGLECT 1279, 1280–82 (2004); Ann E. MacEachron et al., *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451, 454–60 (1996)). Professor Krakoff further notes that "[m]ost studies of ICWA, including a 2005 Government Accountability Office report, note that insufficient recordkeeping and data collection hamper assessments of ICWA compliance and outcomes." *Id.* at 508 n.94 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 4–5 (2005), <https://www.gao.gov/products/gao-05-290> [hereinafter GAO, INDIAN CHILD WELFARE ACT]; Margaret C. Plantz et al., *Indian Child Welfare: A Status Report*, 18 CHILD. TODAY 24 (1989)).

79. 490 U.S. 30 (1989).

80. *Id.* at 36.

81. *Id.* at 37–38.

82. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 17 (2008) ("[B]y all accounts, [Joan Holyfield] was a loving parent who provided a stable home environment.").

83. *Holyfield*, 490 U.S. at 38.

84. *Id.* at 52–53.

85. *Id.* at 53.

86. The irony of this custody case, is that the after winning on the jurisdictional issue and thus, winning the right to decide the children's placement, the Tribe ultimately made the same placement determination as the state court would have. The fear that the tribal court

The *Holyfield* couple lost, but many subsequent challenges were successful and resulted in the creation of significant exceptions to the Act's application. The two most notable exceptions used during this period were the "existing Indian family" exception and the "good cause" exception.⁸⁷

1. Existing Indian Family (EIF) Exception

One of the earliest ICWA exception cases was The Kansas Supreme Court case *In re Adoption of Baby Boy L.*⁸⁸ *Baby Boy L* concerned the adoption of an Indian child by a non-Indian family.⁸⁹ The adoption would have been permissible under state law, but not under ICWA.⁹⁰ The *Baby Boy L* court considered this difference problematic and contrary to the child's best interests.⁹¹ As a result, the court created an exception to the ICWA for Indian children who have never spent time as part of an Indian

would not consider the children's best interests was unfounded. See Maldonado, *supra* note 82, at 17 ("[O]ne might have expected the Tribal Court to return the twins to the Tribe. However, the Tribal Court balanced the Tribes' interest in keeping tribal children in tribal communities against the children's interests in continuity and stability.").

87. See, e.g., Kirk Albertson, *Applying Twenty-Five Years of Experience: The Iowa Indian Child Welfare Act*, 29 AM. INDIAN L. REV. 193, 195 (2004-2005) ("State courts have created exceptions to the applicability of ICWA, most notably the 'existing Indian family' exception[. . . [and] have taken great liberty with the 'good cause' language in § 1915 to deviate from the stated placement preferences.").

88. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

89. *Baby Boy L* involved a child of mixed heritage:

In that dispute, the unmarried non-Indian mother sought to voluntarily relinquish her child for adoption by a non-Indian couple. The Indian father and the tribe objected, arguing that the tribe had a right to intervene in the proceedings and that the trial court should comply with the placement priorities of the ICWA. Rejecting the application of the ICWA outright, the Kansas Supreme Court reasoned that because the child was not being removed from an existing Indian family no legislative purpose of the ICWA would be served by allowing intervention by the tribe.

Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 626 (2002) [hereinafter Atwood, *Flashpoints*]; see also *Baby Boy L.*, 643 P.2d at 174.

90. *Baby Boy L.*, 643 P.2d at 175-76.

91. *Id.* at 174 (finding that the ICWA "if applied as requested by the appellants, would also be inconsistent, contradictory, and would accomplish no worthwhile or useful purpose.").

family.⁹² Under this exception, the court determines whether the Indian child is part of an “existing Indian family” and, if they are not, the court finds the ICWA inapplicable.⁹³ For decades, this exception meant the ICWA was not protecting a sizable portion of Indian children. Eventually, after tireless advocacy, this exception was eliminated.⁹⁴

92. *Id.* at 175–76. Typically, these cases involved bi-racial children who have only been in the custody of their non-Indian parents or relatives. See Atwood, *Flashpoints*, *supra* note 89, at 626 (“[C]ourts that have followed the lead of the Kansas Supreme Court have invoked the exception in a variety of circumstances, the exception has been asserted most often in disputes involving children of mixed heritage, with the Baby Boy L. factual paradigm appearing with particular prominence.”).

93. After decades of litigation and advocacy work, the EIF exception has now mostly been repudiated. See *infra* note 93 and accompanying text. However, this victory was short lived. In 2013 the Supreme Court decided *Adoptive Couple v. Baby Girl*, which created a new exception based on reasoning similar to the EIF doctrine. 570 U.S. 637 (2013). The Court’s discussion of the importance of prior custody is very similar to EIF, see *id.* at 649 (explaining that when an Indian parent has never had legal or physical custody the ICWA is inapplicable because “the ICWA’s primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.”). However, the exception created under *Adoptive Couple* is narrower than the EIF exception since, unlike previous EIF cases, it does not prevent the applicability of other ICWA provisions to children not previously in the custody of an Indian parent.. Marcia A. Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine Is Not Affirmed, but the Future of the ICWA's Placement Preferences Is Jeopardized*, 42 CAP. U. L. REV. 327, 338–39 (2014).

Some scholars have argued that although *Adoptive Couple* does not specifically endorse the EIF, anti-ICWA groups “may view the Court’s reasoning as at least an indirect basis for renewing efforts in states that have never addressed the issue or have rejected the exception.” Caroline M. Turner, *Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements*, 49 COLUM. J.L. & SOC. PROBS. 501, 525 (2016).

94. See 25 C.F.R. § 23.103 (2016). Although the rule does not use the exact nomenclature of the EIF exception, it includes a “mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies.” Bureau of Indian Affs., U.S. Dep’t of the Interior, RIN 1076-AF25, Indian Child Welfare Act Proceedings 93 (2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc1-034238.pdf> [hereinafter BIA, ICWA PROCEEDINGS], quoted in Elizabeth MacLachlan, Comment, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 BYU L. REV. 455, 494. These prohibited factors include “the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.” *Id.* § 23.103(c). However, even before the codification of the BIA regulations, the EIF exception was no longer widely accepted. See BUREAU OF INDIAN AFFS., U.S. DEP’T OF THE INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE

2. Good Cause Exception

The second exception courts employed in response to the ICWA challenges was the “good cause” exception. The ICWA permits deviation from the ICWA’s placement preferences for “good cause,” but does not define the term.⁹⁵ As a result, courts began crafting their own definition, which was frequently little more than a best interests standard.⁹⁶ Like many existing Indian family cases, the good cause exception is often used when the court seeks to place an Indian child in a non-Indian home that would be acceptable under state law but is impermissible under the ICWA.⁹⁷ In such cases, courts use good cause as an end run around the ICWA requirements.⁹⁸ In 2016, the problem of courts abusing the good cause exception was addressed through the codification of Bureau of Indian Affairs (BIA) regulations defining “good cause.”⁹⁹ Now, courts must use this mandated definition to decide whether good cause exists to deviate

ACT 15 (2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf> [hereinafter BIA, ICWA GUIDELINES]; BIA, ICWA PROCEEDINGS, *supra*, at 92 (noting that only a handful of states still applied the exception).

95. 25 U.S.C. § 1911(b).

96. *See, e.g., In re Maricopa Cnty. Juv. Action No. JS-8287*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *Adoption of N.P.S.*, 868 P.2d 934, 936 (Alaska 1994).

97. These cases typically involve children of mixed Indian heritage and the exception is frequently used to keep these children in a non-Indian home in which they have been living for a period of time. Atwood, *Flashpoints*, *supra* note 89, at 645 (“[S]tate courts concluding that the child’s best interests require a permanent placement that will preserve existing emotional bonds and attachments.”).

98. *See, e.g., In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993) (finding that the child’s attachment to the non-Indian adoptive mother and other considerations constituted good cause for placing the child with non-Indian parents); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 526 (Cal. Ct. App. 1996) (holding the children have a “constitutionally protected interest in their relationship with the only family they have ever known” and refusing to apply the ICWA) (superseded by statute on another ground, as stated in *In re Santos Y.*, 92 Cal. App. 4th 1274, 1312 (2001), but that statute, 2006 Cal. Stat. ch. 838, § 47, was then subsequently repealed); *In re Custody of S.E.G.*, 507 N.W.2d 872 (Minn. Ct. App. 1993), *rev’d*, 521 N.W.2d 357 (Minn. 1994) (finding good cause to place the children in the non-Indian adoptive home because the children had bonded with the potential adoptive parents and an Indian adoptive home was not available); *see also* Albertson, *supra* note 87, at 208–09 (“State courts most often find good cause to deviate from the Act’s placement preferences because they apply a best interests test, ‘and then make an Anglo determination of the Indian child’s best interests.’”).

99. 25 C.F.R. § 23.132 (2016).

from the placement preferences. As a result, this change has limited courts' ability to use good cause to circumvent the ICWA's requirements.¹⁰⁰

B. Post-ASFA ICWA Cases

After the passage of the ASFA, the concern that the ICWA might be bad for most Indian children, not just some, increasingly appeared in court decisions applying the Act. Cases decided shortly after the ASFA's enactment show courts struggling to explain how the ICWA could protect the best interests of Indian children while conflicting with otherwise applicable state or federal child welfare policies. This struggle is apparent in cases like *In re W.H.D.*,¹⁰¹ in which a Texas appeals court explained "it is not possible to comply" with both the best interest standard under the Texas code and the best interest requirement under the ICWA because "the term 'best interests of Indian children,' as found in the ICWA, is different than the general Anglo American 'best interest of the child' standard used in cases involving non-Indian children."¹⁰²

The *W.H.D.* court held that it could still protect the best interests of Indian children while applying the ICWA's standard, but other courts found the ASFA and ICWA standards impossible to reconcile.¹⁰³ For example, in *J.S. v. State*, the Alaska Supreme Court acknowledged that the child custody case was governed by the ICWA, yet it refused to apply the applicable ICWA provision. Instead, the court looked to the ASFA for guidance and explained that the congressional policy underlying the ASFA is, or should be, the policy underlying the ICWA.¹⁰⁴

100. *Id.*

101. *In re W.D.H.*, 43 S.W.3d 30, 36–37, 40 (Tex. Ct. App. 2001).

102. *Id.* at 36.

[I]t is not possible to comply with both the two-prong test of the Family Code, which requires a determination of the best interest of the child under the 'Anglo' standard, and the ICWA, which views the best interest of the Indian child in the context of maintaining the child's relationship with the Indian Tribe, culture, and family.

Id. at 36–37.

103. "[W]hat is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family." *Id.* at 36.

104. *J.S. v. State*, 50 P.3d 388, 391–92 (Alaska 2002). As a result, the court refused to apply ICWA's active efforts requirement and replaced it was the aggravated circumstances of ASFA. *Id.*; see Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 57, 68 n.67 (2002).

C. ICWA's Statutory Differences

As the *J.S.* decision demonstrates, the ICWA is most vulnerable when it differs from otherwise applicable child welfare laws.¹⁰⁵ The most significant potential differences between the ICWA and the laws governing non-ICWA cases concern “different burdens of proof,” “different requirements regarding remedial services,” “different required sources of proof,” and a different prioritization system governing the placement of a child.¹⁰⁶

1. Burden of Proof

The ICWA heightens the evidentiary burden needed to terminate parental rights.¹⁰⁷ Section 1912(f) of the Act states:

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.¹⁰⁸

In contrast, most state termination laws only require a showing of clear and convincing evidence that remaining with the parent is not in the child's best interest.¹⁰⁹

105. This includes both federal child welfare statutes like the ASFA as well as state child welfare laws. *J.S.*, 50 P.3d at 391–92.

106. Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 827 (2000). This list is just referring to state court child custody cases involving Indian children. Many Indian child custody cases are never heard in state court. The custody cases of reservation domiciled children are under the exclusive jurisdiction of tribal courts. Determining when a child is considered a domiciliary of an Indian reservation was the subject of *Mississippi Band of Choctaw v. Holyfield*, the Supreme Court's first ICWA case. 490 U.S. 30 (1989).

107. This is only for termination. Foster care placements are governed by a clear and convincing evidence standard. See 25 U.S.C. § 1912(e) (“No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”).

108. *Id.* § 1912(f).

109. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); see also GA. CODE ANN. § 15-11-180 (West 2014); KAN. STAT. ANN. § 38-2250 (West 2006); MINN. STAT. ANN. § 260C.163 (West 2017); W. VA. CODE § 49-4-601(i) (West 2019); see also Camille Workman, *The*

2. Remedial Services

The ICWA also requires a different level of family reunification efforts than is required in non-ICWA cases. In an ICWA proceeding, a court must ensure the state-employed “active efforts” to remedy the problems that led to removal and return the child to the child’s parents.¹¹⁰ In most non-ICWA child welfare proceedings, the state is only required to show it made “reasonable efforts.”¹¹¹

3. Sources of Proof

In an ICWA proceeding in state court, the court must admit and consider testimony by a qualified expert in Indian culture before it may order foster care or terminate a parent’s rights over an Indian child.¹¹² For individuals to be considered “qualified” under the Act, they must have particularized knowledge regarding Indian culture.¹¹³ Such experts typically testify as to whether an Indian child’s cultural needs can be met through a non-Indian placement.¹¹⁴ Cultural experts are not mandated in any other category of child welfare proceedings.

4. Placement Preferences

Lastly, § 1915(a) of the ICWA provides an order of placement preferences for adoptions.¹¹⁵ Under this provision, first preference is to “be

2017 *Uniform Parentage Act: A Response to the Changing Definition of Family?*, 32 J. AM. ACAD. MATRIM. LAW. 233, 247 (2019) (“Most states now incorporate the use of the clear and convincing standard in a termination hearing.”).

110. 25 U.S.C. § 1912(d).

111. 42 U.S.C. § 671(a)(15)(B) (effective Oct. 1, 2019) (requiring only reasonable efforts); *see also, e.g.*, OR. REV. STAT. ANN. § 419B.340(1) (West 2020) (making the explicit distinction between “whether the department has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to prevent or eliminate the need for removal of the ward from the home”).

112. *See* 25 U.S.C. § 1912(f); Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 CAP. U. L. REV. 239, 249 (2008) [hereinafter Atwood, *Achieving Permanency*].

113. Atwood, *Achieving Permanency*, *supra* note 112, at 249; *see* 25 U.S.C. § 1912(f).

114. Atwood, *Achieving Permanency*, *supra* note 112, at 249 n.48 (citing *In re Adoption of Sara J.*, 123 P.3d 1017, 1032 (Alaska 2005) (considering competing expert testimony on whether the cultural needs of the Yup’ik children involved the case could be satisfied by a non-Indian placement)).

115. “It is one of the most controversial sections of the ICWA because it necessarily requires the consideration of race when placing children in adoptive homes.” Kathleena

given to a member of the child's extended family, then to other members of the child's tribe, and, finally, to other Indian families."¹¹⁶ No state has this type of explicit tiered placement requirement.¹¹⁷ As a result, this provision is often seen as mandating adoptive placements that differ greatly from what would be expected in a non-ICWA case.

D. Baby Girl and the ICWA Backlash

The difference between the ICWA and state child welfare law was vividly and emotionally highlighted in the 2015 Supreme Court case of *Adoptive Couple v. Baby Girl*.¹¹⁸ Initially, *Baby Girl* appeared to be a straight-forward ICWA violation case. Baby Girl was an Indian child as defined by the ICWA, and her placement with a non-Indian adoptive couple, instead of her biological father, appeared to be a clear violation of the Act.¹¹⁹ Her father had not consented to her adoption¹²⁰ and, although the

Kruck, Note, *The Indian Child Welfare Act's Waning Power After Adoptive Couple v. Baby Girl*, 109 NW. U. L. REV. 445, 453 (2015).

116. Wahl, *supra* note 106, at 829.

ICWA is more specific in the placement preferences when Indian children are placed in out-of-home foster care. Section 1915(b) of ICWA first requires that the child be placed in the least restrictive setting which most resembles a family. Second, the child must be placed within reasonable proximity to his or her home. Finally, barring any good cause, the child first is to be placed with extended family. If extended family is unavailable or unsuitable, the child is to be placed in a foster home approved by the child's tribe, then to a licensed Indian foster home, and finally to an institution approved by the child's tribe or run by an Indian organization.

Id. (footnotes omitted).

117. The Act also requires a similar, although not identical, set of placement options that apply when Indian children are placed in foster care. *See* 25 U.S.C. § 1915(b).

118. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 644 (2013) ("[F]or the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl . . .").

119. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 (S.C. 2012).

120. *Baby Girl*, 570 U.S. at 644–45.

father's consent wasn't necessary under South Carolina law,¹²¹ the family court held that it was required under the ICWA.¹²²

On appeal, the South Carolina Supreme Court affirmed the family court's decision, stating that the ICWA "mandates state courts consider heightened federal requirements to terminate parental rights as to ICWA parents."¹²³ Given this interpretation of the ICWA, the court agreed there was no basis to terminate the father's rights.¹²⁴ In addition, it noted that even if there were termination grounds, the § 1915 placement preferences meant the adoptive couple would still not be eligible to adopt the child.¹²⁵ The court then ordered Baby Girl returned to her father.¹²⁶

The *Baby Girl* decision led to a national outcry.¹²⁷ There were protests in front of courthouses, teary interviews on national television, and hundreds of thousands of dollars collected through fundraising appeals.¹²⁸ In these forums, the adoptive couple repeatedly argued that the ICWA was unfair and harmful, and the non-Indian public responded with sympathy and

121. Under South Carolina law, failure to financially support the mother during pregnancy constitutes ground for involuntary termination. S.C. CODE ANN. § 63-7-2570(4) (2017); *cf. id.* § 63-9-310 (2010) (establishing that, if the father supported the mother during pregnancy, the father must consent to the adoption); *see also* Zug, *supra* note 93, at 340 ("Under South Carolina law, a parent's failure to provide financial support for a child constitutes grounds for involuntary termination of that parent's parental rights.").

122. *Baby Girl*, 731 S.E.2d at 556, 561.

123. *Id.* at 560.

124. *Id.* at 567.

125. *Id.* at 566–67.

126. *Id.* at 567.

127. *See, e.g.,* Allyson Bird, *Broken Home: The Save Veronica Story*, CHARLESTON CITY PAPER (Sept. 26, 2012, 4:01 AM), <http://www.charlestoncitypaper.com/charleston/broken-home/Content?oid=4185523>; *Veronica May Not Be Saved*, ABC NEWS 4 (July 26, 2012), <http://www.abcnews4.com/story/19121303/veronica-may-not-be-saved>; *Anderson Cooper 360°: Baby Veronica's Story* (CNN television broadcast Feb. 21, 2012); *Adoption Controversy: Battle over Baby Veronica*, DR. PHIL (June 6, 2013), <https://www.drphil.com/shows/1895/>.

128. Jane Burke, Note, *The "Baby Veronica" Case: Current Implementation Problems of the Indian Child Welfare Act*, 60 WAYNE L. REV. 307 (2014) ("'Save Veronica' has become a common phrase in the American South over the past year. It appears on the signs of local businesses, is stamped on light purple bracelets, and is the rallying cry for fundraisers, candlelight vigils, and cupcake sales on holidays. It is the topic of many newspaper articles and television news broadcasts and was recently featured on an episode of the television show 'Dr. Phil'.").

agreement.¹²⁹ Shortly thereafter, the U.S. Supreme Court agreed to hear the case.

Ostensibly, the Supreme Court granted certiorari to determine whether the ICWA's "reasonable doubt" standard, "active efforts" requirement, and placement preferences were applicable to an unmarried father whose child was placed for adoption at birth without his consent.¹³⁰ Nevertheless, it is clear from the Court's decision that it was also moved by the adoptive couple's arguments regarding the dangers of the ICWA. Like the adoptive couple, the Court was extremely concerned that the Act harmed Indian children by treating them differently from non-Indian children.¹³¹ This concern is evident in the majority's declaration that "[i]t is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."¹³² It is also revealed in the concurrence's statement that "[ICWA's] requirements often lead to different outcomes than would result under state law. That is precisely what happened here."¹³³

The *Baby Girl* Court worried that different outcomes meant the ICWA was harming Baby Girl.¹³⁴ As a result, the Court employed a tortured reading of the Act to permit termination of the father's parental rights and prevent him from "play[ing] his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests."¹³⁵

Baby Girl was a turning point in ICWA litigation. The case brought the ICWA and its "injustices" to national prominence. In addition, the Court's decision and sympathy with anti-ICWA arguments emboldened the Act's

129. See *supra* note 127.

130. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 646 (2013).

131. In the years preceding *Baby Girl*, ICWA advocates had worked tirelessly to eliminate the existing Indian family exception and, although the Court did not exactly bring it back, it was a reversal in the efforts to ensure the Act's protections apply to all Indian parents. See, e.g., 10 OKLA. STAT. § 40.4 (2011); IOWA CODE ANN. § 232B.5(13) (West 2020); see also Philip (Jay) McCarthy, Jr., *The Oncoming Storm: State Indian Child Welfare Act Laws and the Clash of Tribal, Parental, and Child Rights*, 15 J.L. & FAM. STUD. 43, 55 (2013) (describing this trend toward eliminating the EIF).

132. See *Baby Girl*, 570 U.S. at 646.

133. *Id.* at 658 (Thomas, J., concurring).

134. *Id.* at 655 ("The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian.").

135. *Id.* at 656 (majority opinion).

opponents.¹³⁶ In the years since *Baby Girl*, challenges to the Act have become more frequent and more dangerous. Constitutional objections to the Act are now filed yearly and, unlike earlier ICWA lawsuits, current challenges focus on eliminating the Act entirely.¹³⁷

Many of these lawsuits are brought by the Goldwater Institute, an organization unapologetically dedicated to eliminating the ICWA. In fact, since the anti-ICWA victory in *Baby Girl*, the Goldwater Institute has filed thirteen complaints challenging the Act as a form of unconstitutional racial discrimination.¹³⁸ So far, nine of these suits have been unsuccessful; the others remain pending.¹³⁹ However, these suits are not the only ICWA challenges. Goldwater's aggressive anti-ICWA tactics have also been adopted by other ICWA litigants. On October 4, 2018, in *Brackeen v. Zinke*,¹⁴⁰ anti-ICWA efforts finally succeeded. The Texas district court in *Brackeen* became the first court to accept the claim that the ICWA is discriminatory and unconstitutional.¹⁴¹

The *Brackeen* decision was reversed on appeal and then reheard before an en banc panel of the Fifth Circuit Court of Appeals.¹⁴² The Fifth Circuit's decision is currently pending.¹⁴³ Still, regardless of the outcome, *Brackeen* represents a turning point in ICWA litigation. For the first time, a

136. In addition, tribes have had increasing success fighting the application of the good cause exception through the passage of state statutes which restrict the use of the good cause exception and most recently through the codification of the BIA guidelines into binding regulations. See BIA, ICWA GUIDELINES, *supra* note 94, at 49; see also 10 OKLA. STAT. § 40.4; IOWA CODE ANN. § 232B.5(13); McCarthy, *supra* note 131, at 55 (describing this trend).

137. See *infra* notes 138–141 and accompanying text.

138. Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 625 (2019) (citing Civil Rights Class Action Complaint for Declaratory & Injunctive Relief at 15, A.D. v. Washburn, No. 15-01259, 2016 WL 5464582 (D. Ariz. Sept. 29, 2016); Kathryn Fort & Victoria Sweet, *Outlier Outsiders: The ICWA Lawsuits and What Is Really Going On*, FEDBAR.ORG (May 8, 2019, 12:16 PM), <https://perma.cc/DC8T-JVDU> (slideshow)).

139. See *id.* at 626.

140. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

141. This case was not initiated by the Goldwater Institute, but they strongly support it and did file an amicus brief in the *Brackeen* case. See Brief Amicus Curiae of Goldwater [sic] Institute, *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-868-O), <https://goldwaterinstitute.org/wp-content/uploads/2018/04/GIs-Brief-Amicus-Curiae.pdf>.

142. Reversed by *Brackeen v. Berhardt*, 937 F.3d 406 (Tex. 5th Cir.), rehearing *en banc* granted by 942 F.3d 287 (Tex. 5th Cir. 2019).

143. *Id.*

federal district court accepted the argument that the ICWA, as a whole, is harmful to Indian children and should be abolished.¹⁴⁴

E. Brackeen v. Zinke

Brackeen was a challenge to the constitutionality of the ICWA. The court's decision was based on the assumption that the Act requires different outcomes in ICWA and non-ICWA cases and that these differences harm Indian children.¹⁴⁵ Such arguments are not new and, in the past, these concerns often led courts to create exceptions to the Act.¹⁴⁶ However, the *Brackeen* court was the first to use this reasoning to invalidate the entire Act.¹⁴⁷

The specific issue in *Brackeen* was whether the ICWA prevented the Brackeens, a non-Indian couple, from adopting an Indian child when the child also had an Indian family wishing to adopt him.¹⁴⁸ Under § 1915(a), the tribal couple should have been a preferred placement and received custody.¹⁴⁹ However, the Brackeens objected.¹⁵⁰ They claimed that without the ICWA, they would have been entitled to adopt the child.¹⁵¹ Consequently, placement with the Indian family was both racially discriminatory, because the ICWA only applied to Indian children,¹⁵² and harmful, because it was contrary to state child welfare law.¹⁵³

144. The district court found that "[t]he specific classification at issue in this case mirrors the impermissible racial classification in *Rice*, and is legally and factually distinguishable from the political classification in *Mancari*." *Brackeen*, 338 F. Supp. 3d at 533. The court therefore "concluded sections 1901–23 and 1951–52 of the ICWA are unconstitutional." *Id.* at 541–42.

145. *Id.* at 528–29 (noting the difference between a case decided under ICWA compared with one evaluated under Texas law).

146. *See supra* Sections II.A.1–2 (discussing the Existing Indian Family exception and the Good Cause exception).

147. "This decision is significant for the child welfare field because the district court's decision marked the first time a federal court found ICWA unconstitutional since its enactment more than 40 years ago." *Fifth Circuit Holds Indian Child Welfare Act Is Constitutional*, AM. BAR ASS'N: CHILD L. PRAC. TODAY (Sept. 17, 2010), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/fifth-circuit-holds-indian-child-welfare-act-is-constitutional/.

148. *Brackeen*, 338 F. Supp. 3d at 526.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 531.

153. *Id.* at 529.

The Brackeens' argument that the ICWA is a form of unconstitutional racial discrimination should have been easily dismissed. As the government noted, such racial discrimination arguments were settled by the Supreme Court decades ago.¹⁵⁴ Well-established judicial precedent supported the government's argument that "Indian" is not a racial classification¹⁵⁵ and that

154. In 1974, the Supreme Court decided *Morton v. Mancari*, and upheld a BIA hiring preference which favored Indian candidates over non-Indian ones. 417 U.S. 535 (1974). The Court held that the term "Indian" in this context was a political rather than racial classification. *Id.* at 553 n.24. Moreover, in the decades since *Mancari* was decided, this distinction has been repeatedly reaffirmed and also specifically held to apply to domestic relations. For example, in *Fisher v. District Court*, the Court held that the state must relinquish jurisdiction over an Indian adoption case because the tribe possessed exclusive jurisdiction. 424 U.S. 382, 390–91 (1976). The Court explained that this jurisdictional treatment was not due to race, but stemmed from the "quasi-sovereign status of the . . . [t]ribe" and was therefore constitutional. *Id.* at 390. The *Brackeen* plaintiffs argued that this precedent *doesn't apply* and that the ICWA provisions were unconstitutional racial classifications. Brief of Individual Plaintiffs-Appellees at 33–34, *Brackeen*, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), 2019 WL 571398.

155. The court accepted the Brackeens' argument that ICWA should be treated like the voter statute in *Rice v. Cayetano*, 528 U.S. 495 (2000). *Brackeen*, 338 F. Supp. 3d at 531–34. However, *Rice* is a rare exception to the *Mancari* doctrine. Nevertheless, the *Brackeen* court held that ICWA had more in common with the statute at issue in *Rice* than the one in *Mancari*. According to the court, *eligibility* for tribal membership is nothing like the *actual* tribal membership at issue in *Mancari*. The *Brackeen* court held that eligibility for tribal membership is akin to saying, "one is an Indian child if the child is related to a tribal ancestor by blood" and, thus, according to the *Brackeen* court, is "similar to the 'blanket exemption for Indians,' which *Mancari* noted would raise the difficult issue of racial preferences." *Id.* at 533. Therefore, because the *Brackeen* court held that ICWA uses ancestry as a proxy for race, it must be analyzed under strict scrutiny. The *Brackeen* court's understanding of "eligibility" under the Act is, as a factual matter, wrong. One is not an "Indian child" under the statute simply by having a tribal ancestor. Such an ancestor is a necessary but far from sufficient condition for tribal membership. Under the Act, an "Indian child" is a child who is already a member of a federally recognized tribe, or one "who is eligible for membership and is the biological child" of a tribal member. Atwood, *Flashpoints*, *supra* note 89, at 608 (citing 25 U.S.C. § 1903(4)). Children who have Native ancestry but are neither members nor eligible for membership are not "Indian children" under the Act. *Id.* Therefore, ICWA only applies to children that have a political connection to a federally recognized tribe. The Act's definition means that a child can be 100% Native American yet exempt from ICWA's coverage if neither parent is an enrolled tribal member. See Brief for Indian Law Scholars as Amici Curiae in Support of Defendants at 24–25, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479), <https://turtletalk.files.wordpress.com/2019/01/indian-law-scholars-amicus-as-filed.pdf> (noting that by omitting the part of the definition that requires children eligible for membership to have a biological parent who is a "member of an Indian tribe," 25 U.S.C. § 1903(4)(b) (emphasis

the designation “Indian” as used in the Act is a political, and not racial, classification.¹⁵⁶ Based on this precedent, the government correctly noted that laws singling out Indians are permissible as long as it can be demonstrated that such laws are “rationally” related to “the fulfillment of Congress’ unique obligation toward the Indians.”¹⁵⁷ In addition, the government also pointed out that numerous court decisions had rejected the Brackeens’ specific claim that the ICWA is unconstitutional race discrimination,¹⁵⁸ and that there was nothing in the facts of the *Brackeen* case to distinguish it from these previous challenges.¹⁵⁹ In fact, the only

added), the court lopped off the part of the statute that plants it firmly on the “political” side of *Mancari*’s distinction). The district court therefore incorrectly concluded that ICWA’s distinction was based on “blood” rather than political membership. *Brackeen*, 937 F.3d at 425–29. The comparison with *Rice* is also incorrect. The *Rice* Court refused to extend *Mancari* in that case because it would have permitted the State, “by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs.” *Rice*, 528 U.S. at 522. In contrast, as Atwood notes, the ICWA

is designed precisely to benefit Indian children as tribal members and to protect tribal survival by ensuring the prominence of the tribe’s voice in child welfare proceedings. Unlike the scheme involved in *Rice*, tribal self-government is directly served by the jurisdictional and procedural protections afforded tribes under the Act. So long as the Act’s key definition of “Indian child” remains intact, the constitutionality would seem secure, even when applied to cases involving children whose families have not maintained meaningful affiliation with their tribes.

Atwood, *Flashpoints*, *supra* note 89, at 632.

156. *Brackeen*, 937 F.3d at 427; *Mancari*, 417 U.S. 535.

157. *Brackeen*, 338 F. Supp. 3d at 531 (citing *Mancari*, 417 U.S. at 554–55).

158. The district court first held that ICWA’s preference to place Indian children in Indian homes is race-based, and under “strict scrutiny” review, the law is not narrowly tailored to further a compelling government interest. *Id.* at 534. The district court held that ICWA, therefore, violates the equal protection component of the Fifth Amendment’s Due Process Clause. *Id.* This holding ignores well-established Supreme Court precedent regarding American Indian tribes as political entities, not racial groups, to which the federal government owes a unique trust responsibility. *See Mancari*, 417 U.S. at 554–55. It is also noteworthy that just one year earlier, the Supreme Court declined to review the argument that ICWA is a race-based law, resulting in the upholding of an Arizona Court of Appeals’ decision that ICWA is not based on race. *See S.S. v. Stephanie H.*, 388 P.3d 569, 576 (Ariz. Ct. App. 2017), *cert. denied sub nom. S.S. v. Colo. River Indian Tribes*, 138 S. Ct. 380 (2017).

159. In its decision, the court also held the ICWA was unconstitutional because it violated the anti-commandeering clause of the constitution by making the states implement ICWA. However, although this argument has not been made before in the ICWA context, it is also easily dismissed. As the Fifth Circuit noted, long-standing constitutional precedent

novel aspect of the *Brackeen* case was that these regurgitated anti-ICWA arguments were accepted.¹⁶⁰

The *Brackeen* decision rejected long-accepted arguments that the quasi-sovereign status of Indian tribes permits the different treatment of Indian children and that this different treatment is beneficial. It showed that such claims are now being met with judicial skepticism and disbelief and that the traditional defenses of the Act are no longer sufficient. Consequently, to ensure the ICWA's future, the argument that the Act is a justifiable exception to normally applicable child welfare law needs to be discarded. Instead of defending the ICWA's differences from state and federal child welfare law, future defenses of the Act must emphasize its similarities.¹⁶¹

The remainder of this Article argues that the alleged differences between ICWA and non-ICWA cases are much greater than the actual differences. Today, state welfare policies favoring quick separations and terminations are being replaced with practices that closely align with the ICWA. Future ICWA advocacy must highlight these similarities and work to increase them. The strongest argument in favor of the ICWA is not that it is good for Indian families, but that its policies are good for all families.

gives congress the right to pass laws and have state courts and agencies enforce them. *See Brackeen*, 937 F.3d at 431 (quoting *New York v. United States*, 505 U.S. 144, 178–79 (1992) (“Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.”)).

160. This is not to concede any argument that potential differences are unconstitutional. In fact, even harmful differences would be constitutional, but such arguments are not winning the war of public opinion. In addition to the above line of Indian law cases, there are also strong constitutional arguments that different treatment, even potentially harmful treatment is constitutional under *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Burt v. Oneida Community*, 33 N.E. 307 (N.Y. 1893), *Smith v. Community Board No. 14*, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985); and recognized by the New York legislature in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 342 (1997) (“The accommodation of distinctive communities is an essential part of what it means to be a liberal society. This tenet has been central to the spirit of American pluralism from the founding of the Republic to the present. On this principle there is no apparent basis for distinguishing between Indians and, say, Amish, or Orthodox Jews.”).

161. *See infra* Part III.

III. ICWA's Shrinking Difference

Equal protection challenges to the ICWA, such as those made in *Brackeen*, are premised on the assumption that Indian and non-Indian children are being treated differently, and that this different treatment is race-based and harmful. In addressing these arguments, ICWA advocates contend that such differences are both constitutionally permissible and beneficial. To support these arguments, many note the Act's similarities with current child welfare practices,¹⁶² such as relative placements¹⁶³ and family preservation.¹⁶⁴ However, such arguments don't go far enough. To change the current perception that the ICWA is harmful, the Act's defenders must address directly the accusation of difference. They must show that the similarities between the Act and current child welfare law are not limited to one or two provisions but reflect an overall confluence of purpose.¹⁶⁵

After the passage of the ASFA, the difference between ICWA and non-ICWA cases was significant; thus, for many years, a claim of similarity would have been incorrect. This is no longer the case. Rapid changes to child welfare law and policy have eliminated many of the former differences between ICWA and non-ICWA cases and recognizing these changes is crucial to defending the Act. The growing alignment between ICWA and non-ICWA cases means it is now easier to refute equal protection challenges and the argument that the Act harms Indian children.

As discussed in Part II, the ICWA provisions that appear to differ the most from state law are the burden of proof for termination, the need for

162. See, e.g., Brief of Casey Family Programs and 30 Other Organizations Working with Children, Families, and Courts to Support Children's Welfare as Amici Curiae in Support of Appellants at 4, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479), <https://turtletalk.files.wordpress.com/2019/01/caseyamicusbrief.pdf> ("Undoing the careful work Congress has done to enact ICWA standards—which are grounded in best-practices for all children—would cause enormous harm to Indian children and undermine the ability of child welfare agencies and courts to serve them.").

163. *Id.* at 9–10 (noting that all but two states give relative preference and such preference is widely accepted as best for children who have to be removed from their families).

164. *Id.* at 9 ("[The] most frequent guiding principle in state statutes for determining a child's best interests is the 'importance of family integrity and preference for avoiding removal of the child from his/her home.'") (quoting CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2016)).

165. One of the benefits of this approach is it would also permit ICWA's defenders to sidestep the question of whether Indians are a political or racial group.

expert testimony, the level of remedial efforts required, and the placement preferences. Upon closer examination, these apparent differences largely disappear.

A. Different Burdens of Proofs

The ICWA requires a higher standard of proof for the termination of Indian parents' rights than required under state law. Specifically, under the ICWA, parental rights may not be terminated without a showing beyond a reasonable doubt "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."¹⁶⁶ Conversely, most states only require clear and convincing evidence that remaining with the parent is not in the child's best interest before permitting the termination of parental rights. At first glance, this seems to be a significant difference, but this difference is illusory. Many state termination cases employ a higher termination standard than clear and convincing, while many ICWA cases are decided under a standard lower than reasonable doubt.

1. Reinstatement of Parental Rights

In the decades since the ASFA's passage, many states acknowledged that the ASFA's termination standard, which permits termination when a child has been in state care for fifteen out of the previous twenty-two months, is too lax.¹⁶⁷ To remedy this problem, these states enacted statutes permitting the reinstatement of parental rights after termination.¹⁶⁸ In 2005, California

166. 25 U.S.C. § 1912(f).

167. Scholars have also argued for a higher termination standard, arguing to establish a higher threshold "before terminating parental rights," specifically a showing that child will be adopted. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 135 (1995) ("[E]ven when preconditions to termination have been proven by clear and convincing evidence, parental rights should not be terminated if reasons exist to maintain the parent/child relationship. Termination of parental rights should only be ordered upon a specific showing that termination is necessary to promote the child's welfare."); see also Kirstin Andreasen, *Eliminating the Legal Orphan Problem*, 16 J. CONTEMP. LEGAL ISSUES 351, 353 (2007); Stephanie Smith Ledesma, *The Vanishing of the African-American Family: "Reasonable Efforts" and Its Connection To the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 71 (2014) (suggesting that ICWA's clear and convincing standard of removal should be applied to all removal cases).

168. Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 150 (2013) ("The impetus behind reinstatement statutes is largely uniform: they are an attempt to

was the first state to enact such legislation;¹⁶⁹ other states soon followed. Currently, eighteen states have statutes permitting “rehabilitated” biological parents to resume or assume parenting responsibilities for their children after their parental rights were legally terminated.¹⁷⁰ Many of the cases deemed appropriate for reinstatement are cases that would not have resulted in termination under a higher evidentiary standard.

In her article, *The Sky Is Not Falling: Lessons and Recommendations from Ten Years of Reinstating Parental Rights*, Professor Meredith L. Schalick groups parental-rights reinstatement cases into three categories. The first involves hard-to-locate parents. In these cases, parental rights are terminated when a child has been removed to state care and the non-custodial parent cannot be quickly located.¹⁷¹ For example, Professor Schalick describes a particularly illustrative case involving a child who lost contact with his father following the mother’s relocation to a new state.¹⁷² The child was later removed from his mother due to neglect.¹⁷³ Child welfare officials then attempted to locate the father as a potential placement and, when they failed to find him, his parental rights were terminated.¹⁷⁴ Several years later, through the use of social media, the child found his father.¹⁷⁵ The child’s lawyer then filed a successful petition to reinstate the father’s rights.¹⁷⁶ By reinstating the father’s rights, the court acknowledged that termination had not been in the child’s best interest and, in effect, retroactively increased the applicable termination standard.

The second category of reinstatement cases involves children living with relatives, who continue to maintain contact with a parent despite the termination of the parent’s rights.¹⁷⁷ In these cases, the children seek to return to their parent’s custody after their relative caregiver becomes unable

address the large number of legal orphans created by the increase in terminations under ASFA.”).

169. CAL. WELF. & INST. CODE § 366.26(i)(3) (2017)..

170. For a complete list of states, see Meredith L. Schalick, *The Sky Is Not Falling: Lessons and Recommendations from Ten Years of Reinstating Parental Rights*, 51 FAM. L.Q. 219, 220–21 (2017).

171. *Id.* at 226.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 226-27.

to care for them, usually due to illness.¹⁷⁸ Typically, the court then reinstates the parent's rights based on the fact that the child and parent maintained their relationship despite termination.¹⁷⁹ By reinstating the parent's rights, these courts acknowledge that termination was not in the child's best interest and that a higher termination standard would have been preferable.¹⁸⁰

The third category of reinstatement cases involves teenagers who are unlikely to be adopted and wish to maintain a relationship or reengage with their biological parents. Courts reinstating parental rights in these cases recognize that, although a child may not be able to return to his or her parent's care, he or she can still benefit from resuming a legal relationship with the parents and extended family. Like the previous two categories of cases, these reinstatement cases acknowledge the problems with speedy terminations, and indicate that a higher standard of proof would have benefitted the child.¹⁸¹

States that address the above situations through the enactment of reinstatement statutes¹⁸² are, in effect, retroactively raising the applicable termination standard.¹⁸³ Reinstatement statutes bring state termination policy closer to the ICWA's policy by recognizing that the clear and convincing termination standard may be inadequate to protect children from the significant harm caused by the loss of the parental relationship.

178. *Id.*

179. *Id.*

180. In one such example, parental rights were reinstated for the biological mother of her client who had an emancipation goal but who was living with the maternal grandmother in a kinship foster care home. The grandmother was diagnosed with cancer and became very ill. Because the biological mother had been seeing the child several times a year for family holiday celebrations already, the court agreed that reinstatement of parental rights was appropriate.

Id. at 227.

181. *Id.* at 227–28.

182. Until recently, most states barred biological parents from seeking to adopt their children after the termination of their parental rights. Paula Polasky, *Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights*, 30 LAW & INEQ. 401, 410 (2012) (“This would mean that if parental rights were terminated and the adoption of the child failed, the birth parents would be barred from re-adopting their own child.”).

183. They are also moving closer to the tribal conception of the parent child relationship which is the belief that the “natural parent-child relationship as something the court cannot permanently and legally sever.” *Id.* at 410–11.

2. EIF and Baby Girl

Reinstatement statutes reveal how states are raising their terminations statutes above a clear and convincing standard. At the same time, ICWA exceptions—such as the former EIF and good faith doctrines, and current exceptions, such as that created in *Baby Girl*—illustrate how states are often able to avoid the ICWA's reasonable doubt standard.¹⁸⁴ As Teresa Legere notes, “Because the evidentiary standard is so high, one might conclude that the Indian families are adequately protected. The reality, however, is that many state courts have created exceptions to the ICWA and have interpreted the ICWA in a way that ‘renders many of its provisions superfluous.’”¹⁸⁵

When such exceptions apply, parental rights terminations occur under the clear and convincing standard.¹⁸⁶ However, exceptions are not the only way this lower standard is applied to an ICWA case. Even without an applicable exception, many courts still apply the lower clear and convincing evidentiary standard to ICWA cases. For example, in the Michigan case *In re Lee*,¹⁸⁷ an Indian mother argued that the court terminated her rights based on “anticipatory neglect” and that this did not meet the ICWA's reasonable

184. Scholars have noted the similarities between the Baby Girl exception. See, e.g., Courtney Hodge, Note, *Is the Indian Child Welfare Act Losing Steam?: Narrowing Non-Custodial Parental Rights After Adoptive Couple v. Baby Girl*, 7 COLUM. J. RACE & L. 191, 229 (2016) (noting “how the analysis in [Baby Girl] is very similar to the logic used in the Existing Indian Family Exception cases”); Kelsey Vujnich, Comment, *A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 J. AM. ACAD. MATRIM. LAW. 183, 205 (2013) (“[T]he [Baby Girl] Court essentially agrees with the ‘existing Indian family’ doctrine.”). However, the EIF, and the exceptions carved out in Baby Girl are different thus, the Baby Girl exceptions continue despite the elimination of the EIF exception. See, e.g., Zug, *supra* note 93 (explaining why *Baby Girl* is not an affirmation of the EIF doctrine but creates its own unique exceptions); see also Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513, 1578 (2019) (“[The] majority carved out two narrow exceptions to ICWA in cases where the Indian parent had not previously had custody of the child.”).

185. Theresa D. Legere, Note, *Preventing Judicially Mandated Orphans*, 38 FAM. & CONCILIATION CTS. REV. 260, 269 (2000).

186. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 650 (2013) (finding the ICWA termination standard inapplicable because the child was not being removed from the father's continued custody and thus state termination standards applied.)

187. *Lee v. Lee (In re Lee)*, No. 283038, 2008 WL 4603740 (Mich. Ct. App. Oct. 16, 2008), *aff'd sub nom. JL v. Lee (In re JL)*, 770 N.W.2d 853 (Mich. 2009).

doubt standard.¹⁸⁸ The Michigan Supreme Court agreed that anticipatory neglect would not meet the ICWA standard.¹⁸⁹ Yet, it upheld the termination based on the mother's "lack of maturity" which, as the concurrence noted, also does not meet the ICWA's "'beyond a reasonable doubt' standard."¹⁹⁰

State court non-compliance with the ICWA, such as that demonstrated in *In re Lee*, is both common and ongoing.¹⁹¹ There are numerous, well-documented instances of courts refusing to comply with the Act.¹⁹² For example, in 2015, two South Dakota Indian tribes sued the state of South Dakota for violating the ICWA.¹⁹³ The case revealed that the removal rate for South Dakota's Indian children was over 80%.¹⁹⁴ In addition, it was shown that one particularly egregious judge had an Indian child removal rate of 100%.¹⁹⁵ Such cases demonstrate that many parental rights termination decisions are being made using a standard far below reasonable doubt.

188. *Id.* at *22.

189. *In re JL*, 770 N.W.2d 853, 870 (Mich. 2009).

190. *Id.* at 874–77 (Cavanagh, J., concurring in part and dissenting in part) (rejecting the majority's termination decision).

191. See Atwood, *Flashpoints*, *supra* note 89, at 587 ("By some accounts the Act has been the victim of entrenched state court hostility ever since its enactment more than two decades ago.").

192. See Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 301–10 (2015) ("Studies have found widespread noncompliance with ICWA. Some of this non-compliance is due to ignorance or carelessness, but there is evidence that it is also part of a common technique to facilitate private adoptions of Indian children by non-Indians.").

193. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 753, 757 (D.S.D. 2015).

194. Marcia Zug, *Traditional Problems: How Tribal Same-Sex Marriage Bans Threaten Tribal Sovereignty*, 43 MITCHELL HAMLINE L. REV. 761, 796 n.206 (2017) (citing Laura Sullivan, *Native American Tribes Win Child Welfare Case in South Dakota*, NPR (Mar. 31, 2015), <http://www.npr.org/2015/03/31/396636927/native-american-tribes-win-child-welfare-case-in-south-dakota>). Sullivan notes that in South Dakota, "[m]ore than 80 percent of native children are placed in white foster homes" and that "[o]ne of the biggest complaints of native families who lost children is that they were never allowed to present their side." Sullivan, *supra*.

195. See, e.g., *Judge in South Dakota Sanctioned in Indian Child Welfare Act Case*, INDIANZ (Apr. 18, 2016), <https://www.indianz.com/News/2016/04/18/judge-in-south-dakota-sanction.asp> (noting Judge Davis "rule[d] against tribes and Indian guardians in 100 percent of the cases involving Indian children"); see also *Oglala Sioux Tribe*, 100 F. Supp. 3d at 753–54, 757.

The irony of the widespread non-compliance with the ICWA's reasonable doubt standard is that, despite the complaint that the ICWA's termination standard is too high, it is likely too low. If there is a difference in termination standards between ICWA and non-ICWA cases, it is that Indian parents are more likely than non-Indian parents to have their rights terminated.¹⁹⁶ Despite the seemingly higher evidentiary standard required under the ICWA, cases such as those out of South Dakota reveal that many Indian families do not even receive the protection of the clear and convincing standard applicable in non-ICWA cases.

B. Remedial Services

The second seeming difference between ICWA and non-ICWA cases concerns the provision of remedial services. Under the ICWA, a state is required to employ "active efforts" to prevent the break-up of an Indian family. In non-ICWA cases, the standard is "reasonable efforts." "Reasonable efforts" is viewed as a lower standard that is deemed satisfied when a family is referred to remedial services.¹⁹⁷ In contrast, the term "active efforts" is typically defined as significant assistance provided

196. The actual termination rates for Indian parents is often much higher than for non-Indian parents. See Elizabeth MacLachlan, Comment, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 BYU L. REV. 455, 487 ("In February 2015, former assistant secretary of Indian Affairs Kevin Washburn announced that the BIA had published revised ICWA guidelines to protect the rights of Indian families and children under the Act and to prevent the breakup of Indian families and destruction of tribes. Washburn stated that these updates have become necessary due to the continued noncompliance of ICWA by state and federal courts.").

197. See *In re Brianna C.*, 912 A.2d 505, 512 (Conn. App. Ct. 2006) ("While the department, perhaps, didn't do everything that it reasonably could have done to prevent removal from the home, the court is satisfied that the department did make reasonable efforts, not all efforts, not all that perhaps should have been done, but made reasonable efforts to prevent removal from the home.") (quoting the trial court order) (internal quotation marks omitted); see also *In re Kristen B.*, 558 A.2d 200, 204 (R.I. 1989) ("This court does not expect the impossible from the various agencies that deal with child protection and placement. Nor shall we burden the agency with the additional responsibility of holding the hand of a recalcitrant parent.") (citation omitted); Jeanne M. Kaiser, *Finding A Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL'Y 100, 116 (2009) ("[In Massachusetts] [t]he Appeals Court has also made it clear that the Department's efforts are limited to linking parents to existing services and that it is not required to fill the gaps in available services on its own. In fact, the Department is not even required to look very hard for available services and instead can rely on an expert opinion asserting that there are no services that would fill a particular need of a parent.").

directly to families by case workers and agencies.¹⁹⁸ Using these definitions, there is a clear difference between the terms “active efforts” and “reasonable efforts,”¹⁹⁹ yet courts and welfare workers are increasingly discarding the traditional definition of reasonable efforts in favor of one more akin to active efforts.²⁰⁰ Moreover, as the trend toward family preservation continues, any remaining difference between the two standards should disappear.

1. Case Law on Reasonable Efforts

The Adoption and Safe Families Act (ASFA) directs states to make “reasonable efforts” to prevent the removal of children from their families and to effectuate their return home as quickly as possible.²⁰¹ However, “reasonable efforts” is not defined.²⁰² Consequently, states are free to determine what constitutes “reasonable efforts.”²⁰³ More importantly, they

198. See GAO, INDIAN CHILD WELFARE ACT, *supra* note 78, at 39 (describing that active efforts under the ICWA often includes “extra assistance” such as help with transportation, providing culturally sensitive hearings or spending more time attempting reunification).

199. See Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 302 (2003) (discussing how states define reasonable efforts).

200. See *infra* Section III.B.1.

201. 42 U.S.C. § 671(a)(15)(A)–(B)(ii).

202. As the Department of Health and Human Services detailed in its Notice of Proposed Rulemaking regarding ASFA, the lack of definition regarding the term “reasonable efforts” was deliberate. 63 Fed. Reg. 50058, 50073 (1998). It explained:

During our consultation with the field, some recommended that we define reasonable efforts in implementing the ASFA. We do not intend to define “reasonable efforts.” To do so would be a direct contradiction of the intent of the law. The statute requires that reasonable efforts determinations be made on a case-by-case basis. We think any regulatory definition would either limit the courts’ ability to make determinations on a case-by-case basis or be so broad as to be ineffective. In the absence of a definition, courts may entertain actions such as the following in determining whether reasonable efforts were made

Id.

203. See, e.g., ALA. CODE § 12-15-301(10) (West 2015); ALASKA STAT. § 47.10.086 (West 2015); CAL. WELF. & INST. CODE § 361.5 (West 2013); FLA. STAT. ANN. § 39.521(1)(f) (West 2012); NEB. REV. STAT. ANN. § 43-292 (West 2009); MINN. STAT. § 260.012(b) (2020); N.Y. SOC. SERV. L. § 384-b (McKinney 2013); OHIO REV. CODE ANN. § 2151.419 (West 2015); 10A OKLA. STAT. § 1-4-808 (2015); TENN. CODE ANN. § 36-1-102(1)(A) (West 2020); WYO. STAT. ANN. § 14-3-440 (West 2015).

are free to define it similarly or even identically to “active efforts.”²⁰⁴ Some states, such as California and Colorado, have done so explicitly²⁰⁵ while many others claim the two terms are different, yet treat them the same in practice.²⁰⁶ For example, in *In re R.J.F.*,²⁰⁷ the Montana Supreme Court explained that, “[t]o meet its requirements to provide reasonable efforts, the [child welfare] Department must in good faith develop and implement voluntary services plans and treatment plans designed to preserve the parent-child relationship and the family unit.”²⁰⁸ Additionally, the court stated that the department must abide by its own “policy to provide ‘the child maximum opportunity for visits with his/her birth parents while services are provided to the family.’”²⁰⁹ Lastly, it explained that “the Department must, in good faith, assist a parent in completing his or her voluntary services and treatment plan.”²¹⁰

In *Dunlap v. Department of Family Services (In re B.A.D.)*, the Wyoming Supreme Court also articulated a rigorous “reasonable efforts”

204. Bob Friend & Kelly Beck, *How “Reasonable Efforts” Leads to Emotional and Legal Permanence*, 45 CAP. U. L. REV. 249, 274 (2017) (“Allowing the court to determine reasonable efforts on a case-by-case basis leaves room for these types of innovative practices to be utilized prior to the time of removal and at the same time as reunification services are being offered, in order to better ensure permanency for the child.”).

205. See *Adoption of Hannah S. v. Walter S.*, 48 Cal. Rptr. 3d 605, 612 (Cal. Ct. App. 2006); see also *People ex rel. K.D.*, 155 P.3d 634, 637 (Colo. App. 2007); see also Scanlon, *supra* note 198, at 630 (“States like California and Colorado treat active efforts the same as ‘reasonable efforts,’ the standard used in proceedings that do not involve the ICWA.”).

206. For example, in *In re Eden F.*, 741 A.2d 873 (Conn. 1999), the Connecticut trial court’s reasonable efforts determinations likely met the ASFA standard. However, the termination was reversed because Connecticut’s appellate courts have defined reasonable efforts in a manner that exceeds minimal federal requirements. To satisfy Connecticut’s reasonable efforts requirement, the court must prove through “clear and convincing evidence” that reasonable efforts were provided and this evidence must include significant detail about the nature of services and the specific party (parent, child, or other person) receiving those services. *In re Eden F.*, 710 A.2d 771, 785–86 (Conn. App. Ct. 1998), *rev’d*, 741 A.2d 873 (Conn. 1999).

207. *In re R.J.F.*, 2019 MT 113, 395 Mont. 454, 443 P.3d 387; see also *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 2007) (“‘Reasonable efforts’ at rehabilitation are services that ‘go beyond mere matters of form so as to include real, genuine assistance.’”) (quoting *In re Welfare of H.K.*, 455 N.W.2d 529, 532 (Minn. Ct. App. 1990)).

208. *In re R.J.F.*, 2019 MT 113, ¶ 28.

209. *Id.*

210. *Id.*

standard more akin to active efforts.²¹¹ Specifically, the court noted that “reasonable efforts” must “go beyond mere matters of form, such as the scheduling of appointments, so as to include real, genuine help to see that all things are done that might conceivably improve the circumstances of the parent and the relationship of the parent with the child.”²¹²

Legal scholars note the substantial overlap between reasonable and active efforts requirements. For example, in his article “Active” Versus “Reasonable” Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes, Mark Andrews examined over 500 Alaskan cases involving families facing parental rights termination and found that, regardless of whether the cases were ICWA or non-ICWA, the efforts requirement was the same.²¹³ According to Andrews, “the Alaska Supreme Court has applied a single standard fairly consistently over the past quarter century.”²¹⁴ Andrews concludes that it is “[t]he court’s failure to succinctly articulate” that there is only one standard that “has created an appearance of uncertainty where it does not exist.”²¹⁵ A 2005 report by the U.S. Government and Accountability Office also remarked on the shrinking difference between these two standards.²¹⁶ According to the report, state child welfare officials noted that “the level of services offered to the general child welfare population has been increasing, blurring the line between active efforts and the ‘reasonable efforts’ states are required to provide to all families whose children are taken into state custody.”²¹⁷

211. 2019 WY 83, ¶ 37, 446 P.3d 222, 232 (Wyo. 2019).

212. *Id.* A number of states use the term “diligent efforts.” *See, e.g., In re Zyrrius Q.*, 161 A.D.3d 1233, 1233–34 (N.Y. App. Div. 2018), *leave denied*, 109 N.E.3d 1156 (N.Y. 2018); *see also In re Cordell M.*, 150 A.D.3d 1424, 1425 (N.Y. App. Div. 2017); *Tyler K. v. State*, No. S-16310, 2017 WL 464380, at *4 (Alaska Feb. 1, 2017) (“[R]easonable efforts’ must include locating support services to assist the parent, referring the parent to those services where available, and documenting its efforts.”). *See, e.g., ARIZ. REV. STAT. ANN.* § 8-533(B)(8)–(11) (2014); *Ohio Rev. Code Ann.* § 2151.414(E)(1) (West 2016) (requiring “diligent efforts,” rather than “reasonable efforts”).

213. Mark Andrews, “Active” Versus “Reasonable” Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes, 19 ALASKA L. REV. 85 (2002).

214. *Id.* at 116.

215. *Id.*

216. GAO, INDIAN CHILD WELFARE ACT, *supra* note 78, at 37.

217. *Id.*

2. Differential Response

The difference between active and reasonable efforts is disappearing as state child welfare agencies increasingly implement policies requiring a higher level of reunification services similar to the active efforts requirement under the ICWA. One of the most important of these policies is “differential response.” The purpose of differential response is to provide families involved in the child welfare system, but considered low-risk for child maltreatment, an alternate pathway for achieving reunification.²¹⁸ Families that choose differential response work cooperatively with the state child welfare department to develop a family assessment and service plan to address their needs and the needs of their children.²¹⁹ The goal of differential response is to provide as many services as possible to keep families together.²²⁰ Differential response programs recognize that families may have multiple needs and attempt to meet these needs through better identification and service delivery than the traditional child welfare system.²²¹

So far, the results of differential response programs are positive.²²² Recent studies of families in these programs confirm they receive greater

218. See Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 J.L. & POL'Y 73, 74 (2012).

219. CASEY FAM. SERVS., CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES DIFFERENTIAL RESPONSE SYSTEM (2010), <https://business.ct.gov/-/media/DCF/DRS/pdf/CFSExecutiveReportDRSFfinalReprintpdf.pdf>.

220. Services can include

- . . . financial assistance, food stamps, food banks, clothing closets, diaper banks, utilities assistance, transitional and subsidized housing, furniture, health care, public benefits enrollment, and coordination;
- Mental health (chronic, situational, trauma-informed);
- Alcohol and drug abuse treatment;
- Employment and training assistance;
- Child care (drop-in, after school, special needs, hours to accommodate shift workers)
- Transportation;
- Parenting education and skill development/life coaching and mentoring;
- Parent leadership, peer support, parent advocacy;
- Social supports, enrichment, and recreational activities; and
- Legal services.

Id. at 10.

221. *Id.* at 4–8.

222. *Id.* at 6.

services and feel more satisfied and involved in the process.²²³ Studies also indicate that differential response families experienced fewer repeat reports of child maltreatment and fewer out-of-home placements.²²⁴

In 2010, the success of differential response programs garnered the attention of Congress. In its reauthorization of the Child Abuse Prevention and Treatment Act (CAPTA),²²⁵ Congress specifically encouraged states to adopt differential response.²²⁶ The CAPTA mandates that states adopt “triage procedures, including the use of differential response, for the appropriate referral of a child not at risk of imminent harm to a community organization or voluntary preventive service.”²²⁷

Given the success and encouragement of differential response programs, it is not surprising that a majority of states have implemented these programs as part of their child welfare policy.²²⁸ In fact, one comprehensive analysis of differential response described it as “one of the more widely replicated child welfare reform efforts in recent history.”²²⁹ Consequently, more and more families are receiving heightened reunification services, and the number should continue to grow.²³⁰

3. Federal Encouragement of “Active Efforts”

The CAPTA’s encouragement of differential response was not the only way the federal government has sought to increase services for families at risk of child removal or parental rights termination. Most notably, in February of 2018, Congress passed the Family First Prevention Services Act (FFPSA) and made federal foster care funds available for preventive services.²³¹ Specifically, the FFPSA “reforms the federal child welfare

223. *Id.*

224. *See id.*

225. CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459.

226. *Id.* § 115, 124 Stat. at 3467-70.

227. 42 U.S.C. § 5106a(b)(2)(B)(v).

228. Houston, *supra* note 12, at 36. A number of states have created pilot programs. For example, Minnesota, Missouri, North Carolina, Washington, and Hawaii all have statewide programs. Godsoe, *supra* note 218, at 75. In March 2019, Connecticut began a pilot program in certain counties and New York City is also set to begin one soon. *Id.*

229. Bartholet, *Differential Response*, *supra* note 12, at 575.

230. Studies indicate that provision of significant services is among the reunification approaches that are the most effective. *See* Kaiser, *supra* note 197, at 136–37. However, it should be noted that studies of reunification service are limited. *Id.* at 136.

231. Pub. L. No. 115-123, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.) (title VII of the Bipartisan Budget Act of 2018, 132 Stat. 64).

financing streams, Titles IV-E and IV-B of the Social Security Act, to provide services to families who are at risk of entering the child welfare system.²³² Such services include reimbursement for mental health services, substance abuse prevention and treatment, and parenting skills training.²³³ Under the FFPSA, states can receive reimbursement for providing up to twelve months of prevention services.²³⁴ The FFPSA allows other program funds “to be used for unlimited family reunification services for children in foster care,”²³⁵ and it permits an additional fifteen months of family reunification services to be used by families after their children return home.²³⁶

The CAPTA and the FFPSA reflect an overall shift in federal policy away from speedy terminations and, once again, toward family preservation. In July of 2018, Associate Commissioner of the Children’s Bureau at the U.S. Department of Health and Human Services (DHHS), Jerry Milner, wrote an editorial for the ABA encouraging this change and advocating for the return to a family-centered approach to child welfare.²³⁷

232. Sarah Katz, *Trauma-Informed Practice: The Future of Child Welfare?*, 28 WIDENER COMMONWEALTH L. REV. 51, 81 (2019); see Family First Prevention Services Act §§ 50711-50713, 50721-50723, 132 Stat. at 232-51.

233. Katz, *supra* note 232, at 81 (citing 42 U.S.C. § 671(e)(1)).

234. Family First Prevention Services Act §§ 50712, 132 Stat. at 244. Moreover, states may only be reimbursed for children placed in group care settings for more than two weeks. Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD. LEGAL RTS. J. 283, 285 (2019) (“Beginning in 2020, Title IV-E reimbursements for group homes will only be available for two weeks unless a child is in a qualified residential treatment program . . .”).

235. Children’s Def. Fund, *The Family First Prevention Services Act: Historic Reforms to the Child Welfare System Will Improve Outcomes for Vulnerable Children 2* (Feb. 2018), <https://www.childrensdefense.org/wp-content/uploads/2018/02/ffpsa-short-summary.pdf>. These funds come from the Promoting Safe and Stable Families Program. See CHILDREN’S BUREAU, PROMOTING SAFE AND STABLE FAMILIES 2 (n.d.), <https://library.childwelfare.gov/cwig/ws/library/docs/capacity/Blob/105742.pdf?r=1&rpp=10&upp=0&w=+NATIVE%28%27recno%3D105742%27%29&m=1>.

236. CHILDREN’S BUREAU, *supra* note 235, at 5.

237. Jerry Milner, *Reshaping Child Welfare in the United States: Lawyers as Partners in Prevention*, AM. BAR ASS’N: CHILD L. PRAC. TODAY (July 4, 2018), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2018/reshaping-child-welfare-in-the-united-states--lawyers-as-partner/ (“[T]he evidence is clear that child welfare in the United States needs a radical transformation in its funding, programs, and its definition of what child welfare can and should achieve. Too often, we use foster care as our primary intervention to protect children, and lack the

Milner advocated for this return as a way to prevent “the unnecessary removal of children from their homes[.]”²³⁸ In particular, Milner noted the importance of increased services to families, stating the DHHS believes “services that strengthen critical protective factors should be available to all families, in their communities, when families need and desire assistance.”²³⁹ A few months later, “in November [of] 2018, the Children’s Bureau issued an information memorandum to ‘strongly encourage’ child protective agencies to focus more on preventive efforts.”²⁴⁰

Due to changing state and federal child welfare policy, non-Indian children are increasingly receiving family reunification services akin to the ICWA’s active efforts requirement. This change undermines the anti-ICWA argument that applying active efforts to Indian families means Indian children are treated differently and worse than non-Indian children. Receiving a high level of reunification services is now viewed as good for all children. Consequently, it is the families that only receive reasonable efforts that now have the strongest claim of harm.

C. Sources of Proof

The third frequently cited difference between ICWA and non-ICWA cases is that the ICWA requires the testimony of an expert in Indian culture. Originally, one of the main problems the ICWA sought to alleviate was the

flexibility in funding and services to respond to families’ needs *before* they are in crisis and harm to children has occurred.”).

238. *Id.*

239. *Id.* In a different editorial, Jerry Milner and David Kelly, who is Special Assistant to the Associate Commissioner/Child Welfare Program Specialist for Court Improvement at the U.S. Department of Health and Human Services, called on attorneys for children and parents to be “active voices for preventing the trauma of unnecessary family separation in and out of the courtroom” and “[a]dvocat[e] vigorously for reasonable efforts to be made to prevent removal or for a finding that reasonable efforts have not been made to prevent removal when that is the situation.” Jerry Milner & David Kelly, *Reasonable Efforts as Prevention*, AM. BAR ASS’N: CHILD L. PRAC. TODAY (Nov. 5, 2018), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2018/reasonable-efforts-as-prevention/.

240. Stephanie K. Glaberson, *Coding over the Cracks: Predictive Analytics and Child Protection*, 46 FORDHAM URB. L.J. 307, 362 (2019); see ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERV., LOG NO. ACYF-CB-IM-18-05, RESHAPING CHILD WELFARE IN THE UNITED STATES TO FOCUS ON STRENGTHENING FAMILIES THROUGH PRIMARY PREVENTION OF CHILD MALTREATMENT AND UNNECESSARY PARENT-CHILD SEPARATION (2018), <https://www.acf.hhs.gov/sites/default/files/cb/im1805.pdf>.

removal of children due to biases about Indian parenting.²⁴¹ The purpose of the expert testimony was to provide a cultural perspective on an Indian parent's actions and prevent cultural bias from causing unwarranted interference with the parent-child relationship.²⁴² Today, the expert's role is still to prevent biased removals from occurring but, increasingly, this testimony is also used to ensure the child is placed in an environment that meets their cultural needs and provides exposure and connection to their Indian heritage.²⁴³ In many cases, this objective means the expert is asked to testify as to whether the placement of an Indian child in a non-Indian home can meet these needs.²⁴⁴

241. For example,

In one 1977 California case, a child was removed from the custody of her aunt by a social worker on the sole ground that "an Indian reservation is an unsuitable environment for a child and that the pre-adoptive parents were financially able to provide a home and a way of life superior to the one furnished by the natural mother."

Graham, *supra* note 23, at 27 (quoting THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 3 (Steven Unger ed., 1977)). In a different case, a Sisseton-Wahpeton Sioux mother, faced termination of her parental rights "on the grounds that she often left [her son] with his sixty-nine-year-old great grandmother," *id.* at 25–26, and in a third, an Indian mother from Oregon faced termination because her son went to live with his aunt while his mother recovered from a broken leg, *id.* at 26.

242. Kacy Wothe, Comment, *The Ambiguity of Culture as a Best Interests Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 HAMLINE L. REV. 729, 771 (2012).

243. *Id.*; see also Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 223 (2017) [hereinafter Maldonado, *Bias in the Family*] (noting that studies also demonstrate that a connection with their Indian heritage may be important for the healthy development of Indian children).

244. See, e.g., *In re Adoption of Sara J.*, 123 P.3d 1017, 1032 (Alaska 2005) (weighing conflicting testimony of two different qualified expert witnesses to determine if the children's placement outside the tribe could meet their cultural needs); *In re Custody of S.E.G.*, 521 N.W.2d 357, 360–61 (Minn. 1994) (using the testimony of a qualified expert witness to hold that it was unlikely the non-native family could adequately meet the Indian children's cultural needs); see *In re Adoption of M.T.S.*, 489 N.W.2d 285, 287 (Minn. Ct. App. 1992) (considering the testimony of a qualified expert witness to determine if an Indian child's extended family would better meet their emotional and cultural needs than placement with a non-Indian foster family); *In re Ashley B.*, No. H12CP02008297A, 2004 WL 3106084, at *45 (Conn. Super. Ct. Dec. 10, 2004) (considering testimony from a qualified expert witness regarding whether placement in a non-Indian home would still permit the child access "to information about her Indian background and what that culture is").

ICWA cases mandate the use of cultural perspective testimony.²⁴⁵ However, all child welfare cases require courts to consider evidence regarding a child's best interest²⁴⁶ and many courts have held this means factoring cultural considerations into their child custody determinations.²⁴⁷ Consequently, the ICWA is not particularly unique when it comes to considering culture in child welfare decisions.

1. Cultural Competence

In the child custody context, cultural competency is defined as the willingness and ability of a prospective parent to meet the special needs of a child who does not share their racial or cultural background. Consideration of cultural competency is widespread and frequently viewed as an important factor in determining whether a particular placement will serve the child's best interest. In some states, the importance of cultural competency is built into the family law code. For example, Minnesota explicitly mandates consideration of the "capacity and disposition of the parties to . . . continue educating and raising the child in the child's culture" as well as consideration of the "child's cultural background."²⁴⁸

245. 25 U.S.C. § 1915(d); see also Linda K. Thomas, *Child Custody, Community and Autonomy: The Ties That Bind?*, 6 S. CAL. REV. L. & WOMEN'S STUD. 645, 653 (1997) (noting most of the cases "taking into account the importance of culture and a child's cultural community occur in the context of child custody decisions relating to Indian children" and attributing that to the ICWA's mandate).

246. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1058–59 (1991) ("In virtually all states, child custody decisions require . . . determination of a custody arrangement that is in the best interest of the child."); John Thomas Halloran, *Families First: Reframing Parental Rights As Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 69 (2014) ("The best interest standard is found within the statutory schemes pertaining to the termination of parental rights in each of the fifty states.").

247. See generally Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 538 (2014) (noting that race is commonly used in family law cases and that courts have been reluctant to limit these race-based practices, indicating that such uses are either benign or even desirable); see also Thomas, *supra* note 245, at 655 ("In a smaller subset of cases which appear to import considerations of cultural context into the traditional 'best interests of the child' standard, courts sometimes take into account a child's racial or other cultural community in child custody decisions.").

248. MINN. STAT. ANN. § 518.17 subdiv. 1(a)(10)-(11) (West 2014) (repealed 2015), quoted in Maldonado, *Bias in the Family*, *supra* note 243, at 215. In addition, many states require that parties include provisions for religious training, if applicable, in their parenting plans. See also D.C. CODE § 16-914(c)(7) (2012).

In other states, the importance of cultural competency has been developed by the courts. These courts consider which parent is more likely to expose the child to its culture and hold it is an important factor in their best interest determinations.²⁴⁹ For example, in *Jones v. Jones*, the South Dakota Supreme Court explained that “it is proper for a trial court . . . to consider the matter of race as it relates to a child’s ethnic heritage and which parent is more prepared to expose the child to it.”²⁵⁰ The *Jones* court further reasoned:

All of us form our own personal identities, based in part, on our religious, racial and cultural backgrounds [and] [t]o say . . . that a court should never consider whether a parent is willing and able to expose to and educate children on their heritage, is to say that society is not interested in whether children ever learn who they are.²⁵¹

Similarly, in *In re Marriage of Gambla*, a divorce case involving an African American mother, Caucasian father, and biracial daughter, the Illinois court viewed cultural competency as an extremely important factor in making its custody determination.²⁵² The court admitted testimony from a university professor who specialized in multiculturalism and child development to help it determine which of the child’s parents would be better equipped to meet her cultural needs.²⁵³ The father objected to this testimony and appealed its inclusion, but the court of appeals affirmed the family court.²⁵⁴ The court explained that the use of testimony regarding cultural competency was permissible because it aided the trial court in determining the child’s best interests.²⁵⁵

249. “Some other states’ statutes, without mentioning culture, also require that parties include provisions for religious training, if applicable, in their parenting plans.” Cynthia R. Mabry, *Blending Cultures and Religions: Effects That the Changing Makeup of Families in Our Nation Have on Child Custody Determinations*, 26 J. AM. ACAD. MATRIM. LAWS. 31, 34 (2013) (describing such laws).

250. 542 N.W.2d 119, 123–24 (S.D. 1996). Although *Jones* involved an Indian child, it was not an ICWA case because it involved a custody dispute between two biological parents.

251. *Id.* at 123.

252. 853 N.E.2d 847 (Ill. App. Ct. 2006).

253. *Id.* at 857–58.

254. *Id.* at 862–64.

255. *Id.* at 864; see Wothe, *supra* note 242, at 749–50.

Both *Gambla* and *Jones* involved custody disputes between biological parents.²⁵⁶ However, the issue of cultural competence also arises in foster and adoption cases. For example, in *In re Guardianship of L.S.*, the court considered the cultural competency of the potential adoptive parents and their ability to meet both the racial²⁵⁷ and religious²⁵⁸ aspects of a different-race child before approving the adoption.²⁵⁹ Similarly in *In re Q.B.*, a Massachusetts court considered the potential adoptive parent's willingness "to accept and nurture the culture and heritage of a child of a different race or background" in determining whether to permit the adoption of Q.B.²⁶⁰ These cases are not unique.

Cultural competency considerations are also increasingly common outside of court cases. For example, many states now have provisions permitting birth parents to express a preference for the placement of their child with a foster or adoptive parent of the same religious background or

256. Maldonado, *Bias in the Family*, *supra* note 243, at 216; *see also* *Rooney v. Rooney*, 914 P.2d 212, 218 (Alaska 1996) ("[T]he opportunities for [the child] to be exposed to his Tlingit heritage are greater in Sitka than in Wrangell [T]he court must consider the child's cultural needs as one factor in the overall context of his best interests."); *Foster v. Waterman*, 738 N.W.2d 662 (Iowa Ct. App. 2007) (considering the cultural competence of the non-Korean mother to exposure her part-Korean daughter to her Korean culture); *In re Marriage of Mikelson*, 299 N.W.2d 670 (Iowa 1980) (upholding the lower court's decision to award custody to the mother after consideration of the ability of each of the parents, who were white, to provide their adopted children, who were half African-American and half white, with frequent association with other African Americans). *But see* *Beazley v. Davis*, 545 P.2d 206 (Nev. 1976) (reversing an award of custody of two children to African-American father rather than Caucasian mother which was based on the fact that the children's physical characteristics were African-American because it constituted impermissible discrimination in violation of the Fourteenth Amendment).

257. *In re Guardianship of L.S.*, No. 4-13-0766, 2014 WL 272665, at *5, ¶ 29 (Ill. App. Ct. Jan. 23, 2014) ("With respect to race, Emily testified she and Scott agreed it was important for their children, especially their adopted biracial son, to be exposed to 'many different people, many different cultures.' Emily said she does not 'not see color,' but rather, 'see[s] color' and 'think[s] it's wonderful.'").

258. "As to the question of religion, the court noted the evidence demonstrated L.S. was 'very involved' with respondents in their faith and L.S. was not familiar with any other faith." *Id.* at *6, ¶ 40.

259. *See also In re Adoption of Persephone*, No. 13-P-188, 2013 WL 5628820, at *1 (Mass. App. Ct. Oct. 16, 2013) ("[J]udges must be sensitive to the backgrounds of the children before them, and to the potential value of cultural connections . . .").

260. Nos. 2-11-0736, 2-11-0966, 2012 WL 6969764, at *11, ¶ 34 (Ill. App. Ct., Mar. 13, 2012).

knowledgeable and appreciative of that background.²⁶¹ Similarly, in domestic adoptions, public and private adoption agencies frequently offer cultural competency training for parents seeking to adopt cross-racially²⁶² and, in international adoptions, cultural competency training is required.²⁶³

The importance of cultural competency is supported by research demonstrating that cultural dissimilarity between foster or adopted children and their caregivers can result in negative psychosocial outcomes. These harms are particularly significant for minority children.²⁶⁴ Transracially adopted minority children often report growing up fearing people of their own race and trying to avoid them.²⁶⁵ At the same time, a lack of exposure to people of the same race or background leaves many minority adoptees feeling isolated or with low self-esteem.²⁶⁶ Studies do not suggest that all transracial adoptions are harmful, but they do highlight the importance of placing children with parents willing and able to provide the cultural support their children need to thrive.²⁶⁷ As Professor Solangel Maldonado notes, “[A]doptive families can and do raise children of other races with high self-esteem and a strong self-identity and sense of belonging.”²⁶⁸

261. In this regard, a number of states permit placement based on families of the same religion. See ARK. CODE ANN. § 9-9-102(b) (West 2011); CAL. FAM. CODE § 8709(a) (West 2012) (“may consider the child’s religious background in determining an appropriate placement”); MINN. STAT. ANN. § 259.29 (West 1995).

262. A parent’s decision to refuse such training can be considered in a parental competency assessment. Tanya Washington, *Loving Grutter: Recognizing Race in Transracial Adoptions*, 16 GEO. MASON U. C.R. L.J. 1, 3 n.7 (2005) (“While the required training would not dispositively inform the placement determination, it would certainly be relevant to parental competency.”).

263. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-51, 1870 U.N.T.S. 167.

264. Sarah A. Font, *Kinship and Nonrelative Foster Care: The Effect of Placement Type on Child Well-Being*, 85 CHILD DEV. 2074, 2075 (2014).

265. Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 338 (2008) [hereinafter Maldonado, *Permanency*].

266. “For example, in one study an African-American transracial adoptee reported feeling ‘different from black people’ and having ‘different feelings’ than them. Another child reported feeling more connected to whites because the African-Americans she knew ‘act ghetto’ and dress differently from her.” *Id.*

267. *Id.* at 338–39; see also RITA SIMON ET AL., THE CASE FOR TRANSRACIAL ADOPTION 48, 51 (1994); David D. Meyer, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL’Y 183, 202 (2007) (citing studies).

268. Maldonado, *Permanency*, *supra* note 265, at 338–39; see also *In re M.F.*, 1 S.W.3d 524, 534–35 (Mo. Ct. App. 1999) (granting preference to a Caucasian couple over the

Nevertheless, Professor Maldonado cautions that “parents must be sensitive to society’s racial biases and ensure that children are exposed to their racial and ethnic background and communities.”²⁶⁹ This means parents must do more than simply expose children to their birth cultures through books and cultural events. They must also provide them with opportunities for significant contact with persons of the child’s racial or ethnic background and ensure this exposure continues as the child ages.²⁷⁰

Professor Maldonado further notes that “[a]lthough some families adopting transracially recognize the salience of race and ethnicity to their children’s self-identities and make efforts to expose the children to their birth culture or people of their own race, not all do.”²⁷¹ For example, one study on transracial adoption found that their parents “tended to minimize the importance of race and downplay incidents of racial slurs or discrimination.”²⁷² As one parent in the study remarked:

People say, “Stay in touch with his racial heritage.” I don’t even know what that is. What is his racial heritage? Some people say we are “denying him his culture,” but from what I can see, if we hadn’t come along, he would be dead. He was malnourished. He was neglected. What really is his culture?²⁷³

child’s African-American aunt because it found the Caucasian couple had demonstrated cultural competency and was equally able to meet the child’s needs with respect to her cultural and racial background).

269. Maldonado, *Permanency*, *supra* note 265, at 339.

270.

[A]doptive parents’ efforts to expose their children to their birth parents’ culture decreases as children grow older. For example, one study of African-American transracial adoptees found that when the children were seven years old, forty-two percent of families emphasized bicultural socialization. However, by the time the children were seventeen, only twenty percent of families did so.

Id. at 338 (citing Kimberly M. DeBerry et al., *Family Racial Socialization and Ecological Competence: Longitudinal Assessments of African-American Transracial Adoptees*, 67 CHILD. DEV. 2378, 2380 (1996)).

271. *Id.* at 337. According to Professor Maldonado, the “parenting styles and values that are perceived as functional for Caucasian, middle-income families may be inappropriate in other cultural contexts.” Maldonado, *Bias in the Family*, *supra* note 243, at 225.

272. *Id.* (quoting Maria Vidal de Haymes & Shirley Simon, *Transracial Adoption: Families Identify Issues and Needed Support Services*, 82 CHILD WELFARE 251, 252 (2003)).

273. *Id.* (quoting Haymes & Simon, *supra* note 272, at 264).

Given the strong negative effects of failing to expose adopted children to their culture and heritage, a potential parent's cultural competence is increasingly recognized as an important factor in determining a child's best interest in all custody cases, and not simply those involving Indian children.

2. Transmitting "American" Culture

The ICWA's critics object to the Act's emphasis on the transmission of Indian culture, but this may be a disagreement about whose culture gets transmitted rather than an objection to the importance of cultural connection in general.²⁷⁴ In the non-ICWA context, courts are often quite open to considering the importance of transmitting American culture to an American child. For example, in custody cases in which "one parent intends to raise the child outside the United States," it is common for courts to compare the relative advantages of the foreign culture versus American culture and presume continued exposure to American culture is in the best interests of an American-born child.²⁷⁵

In *Schultz v. Elremmash*, the Louisiana Court of Appeal awarded an American Catholic mother sole custody of her daughter over the objection of the child's Libyan Muslim father.²⁷⁶ The court reached this decision because it found custody with the mother would give the child a better opportunity "to explore her heritage."²⁷⁷ In explaining its decision, the court highlighted the father's lack of U.S. citizenship and added, disapprovingly,

274. Many transracial adoptee parents object to exposing their adopted children to the children's birth culture because they prefer to pass their own culture and family legacy to their adopted child. Professor Jessica Weaver has suggested that

one factor that may impact the desire of white couples to adopt Asian and Hispanic children is their maintenance of family legacy. Asian and Hispanic children are perceived to be able to assimilate into white culture easier. Statistically, they enter into interracial marriages with whites in larger percentages than blacks; therefore, the property of the family will essentially be kept within the race. While there are obviously other more immediate reasons that whites prefer Asian and Hispanic children over African American children, the fact that their adopted children will inherit their wealth, and therefore perpetuate their form of community, should not be overlooked.

Jessica Dixon Weaver, *The Changing Tides of Adoption: Why Marriage, Race, and Family Identity Still Matter*, 71 SMU L. REV. 159, 174–75 (2018).

275. Thomas, *supra* note 245, at 656–57, *quoted in* Maldonado, *Bias in the Family*, *supra* note 243, at 223.

276. 615 So. 2d 396 (La. Ct. App. 1993).

277. *Id.* at 399.

that “[h]e appears to be extremely critical of American ways.”²⁷⁸ In particular, the court implied that the father’s refusal to allow the child to participate in American cultural events, such as the school Christmas pageant or the recitation of the Pledge of Allegiance was “inappropriate.”²⁷⁹

The consideration of and preference for American culture is also present in adoption cases—particularly those between an American potential adoptive parent and an immigrant birth parent. For instance, in *In re Adoption of C.M.B.R.*, an undocumented mother lost custody of her American-born son in large part because the court compared the child’s potential life with his mother in Guatemala with the benefits he would have as an American child growing up in the United States.²⁸⁰ Similarly, in *Nebraska v. Maria L. (In re Angelica L.)*,²⁸¹ which also involved the termination of an undocumented immigrant mother’s parental rights, the lower court terminated the mother’s rights because it determined that “living in Guatemala would put [the American children] at a disadvantage compared to living in the United States.”²⁸² This case was ultimately reversed on appeal yet, the Nebraska Supreme Court was sympathetic to the “culture clash” the case presented.²⁸³

American courts routinely consider the role of culture in non-Indian family law cases. Thus, there is little merit to the argument that cultural considerations are uniquely or unfairly applied to Indian child custody cases. In fact, such cases indicate that not only is the consideration of cultural competency widespread and not unique to ICWA cases, but that

278. *Id.* at 400.

279. *Id.* at 399. The court concluded that the child’s mother had her “best interest at heart” because she wanted her daughter “to experience life in a carefree manner.” It then contrasted this desire with the father, whom the court believed wanted the child “to be raised in a very restricted manner.” *Id.* at 400, *quoted in* Maldonado, *Bias in the Family*, *supra* note 243, at 220.

280. No. SD 30342, 2010 WL 2841486, at *8 (Mo. Ct. App. July 21, 2010) (“While the trial court did not expressly say that Respondents could provide a better home in the United States for Child, it did so through its actions because it found for Respondents even though it had no knowledge of the type of home Mother could offer to Child in Guatemala.”); Marcia Zug, *Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should Be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139, 1144–47 (discussing whether the potential benefits of life in the United States should factor into immigrant child custody determinations).

281. 767 N.W.2d 74, 94 (Neb. 2009).

282. *Id.* The trial court’s decision was overturned because the Nebraska Supreme Court held that such considerations “not determinative of the children’s best interests.” *Id.*

283. *Id.*

court preference for American culture means cultural competency considerations are especially needed in ICWA cases.

D. Placement Preferences

The ICWA's placement preferences set out an order of preference for the placement of Indian children. First preference is with the child's immediate family, second preference is with a member of the child's tribe, and third preference is with any other Indian.²⁸⁴ This preference provision is contentious because potential adoptive parents may find themselves passed over in favor of caregivers who satisfy one of the preferences categories. Not surprisingly, many ICWA challenges are brought by potential adoptive parents who did not meet the ICWA preference categories. These parents claim the preferences are racially discriminatory and harm Indian children. The merit of such claims must be evaluated for each of the three categories separately.

1. Relative Preference Under State Law

The first preference category under the ICWA is for placement with the child's relatives.²⁸⁵ However, preference for relative placement is not unique to the ICWA. As Professor Sarah Krakoff notes, "ICWA's goal of ensuring that children are placed with their relatives rather than in foster care or institutions is, according to many schools of thought, the best

284. This section states that in any adoptive placement, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; (3) other Indian families." 25 U.S.C. § 1915(a). The ICWA also specifies the following preferences for foster placement proceedings:

In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

See id. § 1915(b).

285. *See id.*

approach for all children, not only American Indian children.”²⁸⁶ Studies consistently demonstrate that children placed in kinship care experience greater placement stability and are less likely to return to foster care as compared to children living with foster families.²⁸⁷ Therefore, it is not surprising that both state and federal laws strongly support relative placement. For example, in South Carolina, “[r]elatives are given preference in placement options provided such placement is in the best interest of the child(ren).”²⁸⁸ Similarly, Colorado’s family law code states “the court shall place the child with a relative . . . if such placement is in the child’s best interests.”²⁸⁹ Louisiana’s code is also similar and states that “[t]he court shall place the child in the custody of a relative unless the court has made a specific finding that such placement is not in the best interest of the child.”²⁹⁰

In addition to explicit kinship care preferences, such as the ones noted above, many states are enacting laws and policies encouraging relative caregiving. Two of the most prominent examples of this trend are the increasing support for legal guardianship and the growth of grandparent visitation statutes.

(a) Legal Guardianship

A legal guardian is a person who assumes legal responsibility for a child in place of a birth parent.²⁹¹ However, under a legal guardianship arrangement, the birth parent’s rights are not terminated.²⁹² Instead, parents retain various rights and obligations including visitation rights and the

286. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 509 (2017).

287. William Vesneski et al., *An Analysis of State Law and Policy Regarding Subsidized Guardianship for Children: Innovations in Permanency*, 21 U.C. DAVIS J. JUV. L. & POL’Y 27, 37 (2017).

288. Licensure for Foster Care, S.C. CODE ANN. § 114-550(L)(2) (2003).

289. COLO. REV. STAT. § 19-3-508(5)(b)(I) (2018).

290. LA. CHILD. CODE ANN. art. 683 (B) (2014); *see also In re JW*, 2010 WY 28, ¶ 22, 226 P.3d 873, 879 (Wyo. 2010) (citing DFS Policy 5.7 (2008) which states “Relative and kinship placements are less restrictive and therefore preferable to other types of out-of-home care. The DFS caseworker is responsible for conducting an ongoing diligent search for relatives and kin for any child in DFS custody until permanency is achieved.”).

291. Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 255 (2004).

292. *Id.*

obligation to provide child support.²⁹³ In addition, under a legal guardianship arrangement, the state fully relinquishes “custody of the child and the permanent guardian is not subject to continuing state supervision.”²⁹⁴ For these reasons, kinship caregivers often prefer legal guardianship; yet, until recently, states considered it an inferior custody option.

Legal guardianship was first identified as a permanency outcome under the ASFA but was not strongly encouraged.²⁹⁵ The ASFA’s hierarchy of “permanency goals” prioritizes “reunification with the biological parent, then adoption, then legal guardianship with a relative or other caregiver.”²⁹⁶ The ASFA considers adoption more permanent and, thus, more desirable than other custody options; for decades, this influenced state treatment of kinship care.²⁹⁷ Nevertheless, the ASFA’s assumptions about permanency are flawed. As Professor Sacha Coupet notes, the ASFA’s presumption favoring adoption

fails to account for the fact that adoption within kinship networks “is [inherently] complicated by the complex and ambivalent nature” of the relationship between the caregiver and both the birth parent and the other members of the family. Indeed, “[o]ne of the most difficult challenges facing child welfare caseworkers is discussing adoption and [permanent] guardianship with [kinship caregivers] who [legitimately] do not believe that” changes in their legal status vis-à-vis their wards will help them or make the “children feel [more] safe or secure.”²⁹⁸

Similarly, in their work on kinship caregiving families, Professors Patricia O’Brien, Carol Rippey Massat, and James P. Gleeson note that

293. *Id.*

294. *Id.*

295. See Katz, *supra* note 42, at 1085 n.22 (“ASFA was originally titled the ‘Adoption Promotion Act of 1997.’ See H.R. Rep. No. 105-77, at 1 (1997).”).

296. *Id.* at 1085–86.

297. This preference was based on acceptance of the ASFA’s view that adoption provided the most permanency and was compounded by the absence of federal reimbursement for guardianships commensurate to that applicable to adoption. See *infra* Section III.D.2 (discussing current federal support for legal guardianship). See also Patten, *supra* note 294, at 254.

298. Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence”*, 34 CAP. U. L. REV. 405, 440 (2005) (alterations in original).

“[a]lthough it is commonly believed that adoption . . . increases the sense of permanence, security, and belonging of children adopted by nonrelative foster parents, caregivers in this and other studies point out that these children are already members of their families.”²⁹⁹

The circumstances surrounding kinship care are significantly different than traditional adoption in which the adoptive parent’s rights and connection to the child are grounded in the termination of the birth parent’s rights. Only recently have states begun to recognize that a lack of parental rights termination cannot be assumed to make kinship care less permanent. This new understanding of legal guardianship, combined with the growing recognition of the other benefits of kinship care, has led to a dramatic increase in state subsidized legal guardianship. “In 1996, only six states had subsidized legal guardianship programs . . . [b]y 2002, [thirty-four] states and the District of Columbia had some form of subsidized legal guardianship program for children in foster care.”³⁰⁰ Today, due to the availability of federal support, the numbers are even higher.³⁰¹ As a result, a kinship care preference is now commonplace in child placement decisions.³⁰²

(b) *Grandparent Visitation*

The nationwide existence of grandparent visitation statutes,³⁰³ even after the Supreme Court’s decision in *Troxel v. Granville*, further highlights state

299. Patricia O’Brien et al., *Upping the Ante: Relative Caregivers’ Perceptions of Changes in Child Welfare Policies*, 80 CHILD WELFARE 719, 742 (2001).

300. Patten, *supra* note 294, at 257.

301. *See infra* Section III.D.2.

302. *See* Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 FUTURE CHILD. 72–74 (1998) (describing the trend towards placement within the family, the rapid growth of kinship foster care nationwide and the impact of financial incentives).

303. *See, e.g.*, ALA. CODE § 30-3-4.2 (1975); ARIZ. REV. STAT. ANN. § 25-409 (2013); ARK. CODE ANN. § 9-13-103 (West 2019); CAL. FAM. CODE § 3103 (West 1994 & Supp. 2001); COLO. REV. STAT. § 190-1-117 (West 2014); CONN. GEN. STAT. ANN. § 46b-59 (West 2013); DEL. CODE ANN. tit. 10, § 1031(7) (West 2016); FLA. STAT. ANN. § 752.011 (West 2015); IND. CODE ANN. § 31-17-5-2 (West 2004); IOWA CODE ANN. § 600C.1 (West 2012); MD. CODE ANN., FAM. LAW § 9-102 (West 1984); MASS. GEN. LAWS ANN. ch. 119, § 39D (West 1998); MISS. CODE ANN. § 93-16-1 (1999 & Supp. 2000); MONT. CODE ANN. § 40-9-102 (2015); NEB. REV. STAT. § 43-1802 (1998); NEV. REV. STAT. ANN. § 125C.050 (West 2001); N.H. REV. STAT. ANN. § 461-A:13 (2005); N.M. STAT. ANN. § 40-9-2 (West 1999); N.Y. DOM. REL. LAW § 72 (McKinney 2004); N.C. GEN. STAT. ANN. § 50-13.2(b1) (West 2017); WYO. STAT. ANN. § 20-2-202 (West 2013).

recognition of the importance of helping children maintain their familial relationships in the event of family disruption.³⁰⁴ In *Troxel*, the Supreme Court held that Washington state's relative visitation statute was overly broad and unconstitutional.³⁰⁵ After *Troxel*, many states revised their visitation statutes, but all continued to permit relative visitation under certain circumstances, such as the death of a parent or parental divorce.³⁰⁶ Louisiana's visitation statute is typical; it permits grandparents to seek visitation if the parents are not married or are divorced and the court deems such visitation in the child's "best interest."³⁰⁷ The statute also states that, in extraordinary circumstances such as the opioid crisis, visitation may be sought by "any other relative, by blood or affinity, or a former stepparent or stepgrandparent."³⁰⁸

Visitation is not same as custody. Nevertheless, state protection and encouragement of relative visitation rights should be viewed as part of states' overall preference for kinship care placements.³⁰⁹

2. Federal Support for Relative Preference

Relative preference is also supported by federal law. The two most important statutes are the 2008 Fostering Connections to Success and Increasing Adoptions Act (FCA) and the Family First Prevention Services Act (FFPSA).³¹⁰

304. 530 U.S. 57 (2000).

305. *Id.* at 75.

306. See, e.g., OHIO REV. CODE ANN. § 3109.11 (West 2000) (relative can seek visitation after the death of the child's parent); see also *In re RV*, 470 P.3d 531, 538–39 (Wash. Ct. App. 2020) ("The death of a parent is not infrequently the source of visitation disputes" and may be "consider[ed] . . . as an 'other factor relevant to the child's best interest.'").

307. LA. CIV. CODE ANN. art. 136 (2018).

308. *Id.* § 136(B)(2). In *Esasky v. Ford*, 743 S.E.2d 550, 551 (2013), the court even awarded visitation after the child had been adopted (this, however, was a limited exception to cases where the child has been adopted by a blood relative).

309. These state statutes acknowledge that abruptly ending these emotional ties through denial of visitation can cause severe psychological harm, stressing continuity and stability in a child's life. Granting nonparental visitation is necessary to prevent this harm. Rachel Roberson, *Nonparent Visitation: Science Says It's in the Child's Best Interests*, TENN. B.J., Apr. 2018, at 23–24 ("[S]everal state laws use statutory or equitable power to grant visitation to nonparents in cases involving cohabitation, *loco parentis*, or a 'psychological parent[.]' . . . when a substantial personal relationship between the child and nonparent exists.").

310. Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCA), Pub. L. No 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.,

a) Fostering Connections Act

One of the major hurdles for increasing legal guardianship was that the ASFA provides financial incentives for adoption³¹¹ but not for legal guardianship. The FCA's passage remedied this imbalance. The FCA seeks to incentivize relative caregiving by allowing federal Title IV-E foster care maintenance money to be used by states to provide kinship legal guardians with subsidies similar to those received by adoptive parents under the ASFA.³¹² However, the FCA's support for relative caregiving went beyond funding equalization. For example, the FCA also demonstrated its preference for relative caregiving through the creation of family finding programs. Such programs help locate biological family members to care for children removed from their parents' custody. Additionally, the FCA created "Kinship Navigator" programs, which provide relative caregivers with information and support services.³¹³ Most importantly, although the FCA sets out a basic framework for subsidized guardianship programs, it also grants states the discretion to shape their programs in the way they believe will be the most beneficial to relative caregivers in their states.³¹⁴

b) Family First Prevention Services Act

The ASFA and its preference for adoption remains current federal policy. Nevertheless, the increasing federal support for relative caregivers

including 42 U.S.C. § 671(a) and 42 U.S.C. § 673(d)); Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.) (title VII of the Bipartisan Budget Act of 2018, 132 Stat. 64).

311. 42 U.S.C. § 673(a)(1)(B)(i); *see also* Katz, *supra* note 42, at 1086 ("Once reunification is ruled out, ASFA creates strong financial incentives for states to pursue adoption, over legal guardianship, as a permanency goal through the open-ended entitlement program known as the Adoption Assistance Program.").

312. *See* Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD. LEGAL RTS. J. 101, 115 (2019) (describing federal funding for kinship care); Katz, *supra* note 42, at 1087 (noting that the FCA helped subsidize "some kinship legal guardians . . . similar to the subsidy adoptive parents receive through the Adoption Assistance Program."); *see also* Vesneski et al., *supra* note 287, at 33 (stating that "[a]s of this writing, 32 states, the District of Columbia and six tribes" offer these federal subsidies).

313. Riehl & Shuman, *supra* note 312 (noting such services may include "links to local county resources, connections to needed referrals, and a forum to answer questions regarding kinship caregiving").

314. For example, states may "modify some eligibility requirements, provide [additional monetary] supports . . . and formulate the terms of the agreement between guardians and the states." Vesneski et al., *supra* note 287, at 34.

demonstrates that the federal government no longer regards adoption as the preferred permanency option when relative care is available. In particular, the Family First Prevention Services Act,³¹⁵ which permits family preservation and reunification funds to be used for relative caregivers, strongly demonstrates the federal government's growing endorsement of relative caregiving.³¹⁶ In addition, the FFPSA supports relative caregiving by mandating that states demonstrate how their foster care licensing standards encourage and accommodate kinship care,³¹⁷ requiring agencies to identify potential relative caregivers within thirty days after a child's removal,³¹⁸ and permitting states to waive non-safety related foster care licensing requirements.³¹⁹

The above state and federal laws supporting kinship care demonstrate that the ICWA's relative preference is neither unique nor harmful. Today, relative preference is considered best practices for all children removed from parental care. This preference is not limited to Indian children and families.

3. Community Preference

The second ICWA preference requires states to place an Indian child with a member of their tribe if a relative placement is not available. Non-Indian children are rarely members of Indian tribes. However, these children are members of other types of communities and child welfare policy is finally recognizing the importance of the child's community. Today, growing numbers of states seek community support to help families facing child removal and provide potential caregivers when removal is necessary.

315. Pub. L. No. 115-123, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.) (title VII of the Bipartisan Budget Act of 2018, 132 Stat. 64)

316. The need for such programs became clear as the number of children living with relative foster caregivers rose rapidly. For example, "[i]n 2014, 29 percent of the 415,000 children in care were living in relative foster homes." Vesneski et al., *supra* note 287, at 35.

317. Children's Def. Fund, *supra* note 235, at 2. For children currently residing in foster care, the Act sets no limit on the amount of Promoting Safe and Stable Families Program funds that may be used for family reunification services. *Id.* In addition, it permits "an additional 15 months of family reunification services" after these children are returned to their families. *Id.* Such programs include the evidence-based Kinship Navigator program. *Id.*

318. 42 U.S.C. § 671(a)(10)(D).

319. *Id.* § 671(a)(29).

a) Family Group Decisions-Making

Many of the family support programs used by states to prevent child removals are now community-based. Community-based, in this context, has a dual meaning: it means that community resources are used to support families facing removal and that the community takes responsibility for the family and makes child welfare determinations in collaboration with the child's family. This process is termed Family Group Decision-Making (FGDM).

FGDM acknowledges the importance of including both the family³²⁰ and the larger community in child welfare decision-making.³²¹ Consequently, when a critical child welfare decision is required, FGDM can be initiated and overseen either by service providers or by community organizations.³²² By including the community in child welfare decisions, FGDM demonstrates that the welfare of children is not just the parents' responsibility but also the responsibility of the child's community.³²³

Extensive studies prove the success and benefits of FGDM. As Professor Charisa Smith notes, FGDM has "reduced the number of children in foster

320. *Family Group Decision Making in Child Welfare: Purpose, Values and Processes*, KEMPE CTR. FOR THE PREVENTION & TREATMENT OF CHILD ABUSE & NEGLECT (May 2013), <https://perma.cc/XG73-CN3B>, quoted in Friend & Beck, *supra* note 204, at 278 ("When agency concerns are adequately addressed, preference is given to a family group's plan over any other possible plan.").

321. "FGDM affirms the culture of the family group, recognizes a family's spirituality, fully acknowledges the rights and abilities of the family group to make sound decisions for and with its young relatives and actively engages the community as a vital support for families." AM HUMANE ASS'N & FGDM GUIDELINES COMM., GUIDELINES FOR FAMILY GROUP DECISION MAKING IN CHILD WELFARE 8 (2010) [hereinafter GUIDELINES], http://www.pacwrc.pitt.edu/Curriculum/207RemoteFGDMPart2/TableResources/TBLR01_GdlnsFrFmlyGrpDcsnMknngInChldWlfr.pdf, cited in Friend & Beck, *supra* note 204, at 277. For example, Connecticut DCF "began implementing a family conferencing model in 2005." CASEY FAM. SERVS., *supra* note 219, at 3 ("The primary goal of this initiative was to increase the level of family involvement in case planning by engaging parents and their networks in problem solving and identifying the strengths and needs of each family.").

322. Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307, 343 (2015) ("FGDM is typically initiated by service providers or community organizations and includes social services agencies and governmental authorities who assure that any plans created adequately address agency concerns.").

323. *Id.* ("In the words of FGDM experts, 'children have a right to maintain their kinship and cultural connections throughout their lives. Children and their parents belong to a wider family system that both nurtures them and is responsible for them.'").

care, decreased instances of maltreatment, kept biological families intact, and improved holistic family wellbeing.”³²⁴ FGDM recognizes the important caregiving role that can be played by the child’s community. Its similarities to the ICWA have also been noted. As Michigan Judge Michael Cavanagh explains, FGDM is a great tool “to achieve a central goal of ICWA” and to “use in proceedings involving non-Indian children.”³²⁵

b) Fictive Kin

The idea behind the ICWA’s second placement preference is that placement with a member of the child’s tribe helps the child stay connected to his or her family and culture during a time of tremendous upheaval. A non-Indian parallel is state statutes permitting placement with “fictive kin,” meaning non-relatives who have established a close relationship with a relative of the child.³²⁶ Rights for fictive kin are an outgrowth of state recognition of the importance of placing children with relative caregivers and an acknowledgment that the definition of relative may be more about relationships than biology.³²⁷

324. *Id.*

325. Justice Michael F. Cavanagh, *State Court Administrative Office—Court Improvement Program: Indian Child Welfare Act Forum Remarks, October 6, 2008*, 89 MICH. B.J. 23, 25 (2010); see also C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 309 (2004) (“[O]ne commentator has questioned whether restorative justice methods, originally the province of indigenous peoples, would ultimately prove feasible or effective in non-indigenous contexts.”). Others have also noted that FGDM is based on more traditional decision-making practices. See GUIDELINES, *supra* note 321, at 6. Supporters of this community-based approach to child welfare decision-making note that “[t]he practice is informed by traditional decision-making processes in many cultures that accent the importance of custom, communality, collectivity, consensus and taking time in arriving at sound and lasting resolutions to issues affecting family life.” *Id.*

326. See, e.g., ARK. CODE ANN. § 9-28-108(a) (West 2019) (defining “Fictive kin” as a person “who . . . [i]s not related to a child by blood or marriage; and . . . [h]as a strong, positive, and emotional tie or role in the . . . [c]hild’s life; or [c]hild’s parent’s life if the child is an infant”); GA. CODE ANN. § 15-11-2 (West 2020) (“‘Fictive kin’ means a person who is not related to the child by blood, marriage, or adoption but who prior to his or her placement in foster care is known to the family, has a substantial and positive relationship with the child, and is willing and able to provide a suitable home for the child.”); N.M. CODE R. § 8.26.4.7(R) (LexisNexis 2020) (defining fictive kin as a “person not related by birth, adoption or marriage with whom the child has an emotionally significant relationship.”).

327. Under the FCA, “states have the discretion to limit the definition of relatives to those people related by blood, marriage, or adoption, or to further expand their definitions to fictive kin—individuals with whom the child has a close relationship, such as close family

Numerous states now allow fictive kin to serve as relative caregivers.³²⁸ In these states, the term “relative caregiver” is broadly defined. In California, such caregivers “may include relatives of the child, teachers, medical professionals, clergy, neighbors, and family friends.”³²⁹ In Montana, the definition of “kinship caregiver” is particularly interesting. It lists “the child’s godparents; . . . the child’s stepparents; or . . . a person to whom the child, child’s parents, or family ascribe a family relationship and with whom the child has had a significant emotional tie.”³³⁰ In addition, it includes “a member of the child’s or family’s tribe.”³³¹ By including tribal members in this list, the Montana Code recognizes the similarities between members of the child’s tribe and other non-relatives with whom the child shares an important relationship.

Supporters of expansive definitions of relative caregivers cite the significant research demonstrating that children’s successful development is closely tied to relationships with their family of origin and with other persons with whom they have close or meaningful relationships.³³² In

friends.” Vesneski et al., *supra* note 287, at 43; *see also* Patten, *supra* note 291, at 259 (noting the majority of states employ an expanded definition of kin).

328. “Twenty-eight states have statutes that grant preference to placement with ‘fictive kin,’ or extended family, over strangers.” Rosie Frihart-Lusby, Note, *Unconstitutional or Just Bad Policy?: Title IV-E’s AFDC “Lookback” and the Constitutional Guarantee of Equal Protection*, 93 S. CAL. L. REV. 1069, 1081 n.84 (2020). Notably, many of these states also make the explicit comparison between tribal members and fictive kin by considering tribal members fictive kin even if they are strangers to the child. *Id.* In addition, forty-one states currently permit fictive kin to serve as guardians under Guardian Assistance Programs. Vesneski et al., *supra* note 287, at 43.

329. CAL. WELF. & INST. CODE § 362.7 (West 2014); *see also* ALASKA STAT. ANN. § 47.10.080 (West 2018) (permitting placement with a “family friend”); HAW. REV. STAT. § 587A-4 (2017) (using the Hawaiian term “hanai relative,” to indicate unrelated adults found “to perform or to have performed a substantial role in the upbringing or material support of a child”); MINN. STAT. § 257.85 (2015) (permitting children to be placed with a “relative or important friend with whom the child has resided or had significant contact”); N.J. STAT. ANN. § 3B:12A-2 (West 2002) (defining “Kinship relationship” to include a “family friend”); N.C. GEN. STAT. ANN. § 7B-505 (West 2017) (permitting placement with “nonrelative kin”).

330. MONT. CODE ANN. § 52-2-602 (West 2003).

331. Defining “Kinship foster home” to include “a member of the child’s or family’s tribe.” *Id.* § 52-2-602(4).

332. *See, e.g.,* Rosemary J. Avery, *An Examination of Theory and Promising Practice for Achieving Permanency for Teens Before They Age Out of Foster Care*, 32 CHILD. & YOUTH SERVS. REV. 399, 399–402 (2010) (citing JEFFREY ARNETT & JENNIFER LYNN TANNER, EMERGING ADULTS IN AMERICA: COMING OF AGE IN THE 21ST CENTURY 27–28 (2006); Teresa

arguing for this expanded definition of “kin,” advocates note that not all communities and cultures define family based on blood relations.³³³ In fact, many tribes do not.³³⁴ The ICWA’s tribal preference reflects tribal conceptions of family but, as the state definitions of kinship caregiver demonstrate, it reflects non-Indian definitions of family as well.³³⁵

c) Geographic Barriers to Adoption

The ICWA placement preferences seek to keep children connected to their communities and tribes by preferencing tribal placements over non-tribal placements, with the exception of non-tribal family placements. Critics of the ICWA assume that this preference to keep children in their geographic community is unique to Indian children but, in fact, the majority of states have in-state adoption preferences, many of which are quite strong. For example, more than one third of the states, as well as Guam,³³⁶ the Northern Mariana Islands, Puerto Rico, and the Virgin Islands require adoption petitioners to be state residents.³³⁷

M. Cooney & Jane Kurz, *Mental Health Outcomes Following Recent Parental Divorce: The Case of Young Adult Offspring*, 17 J. FAM. ISSUES 495, 496 (1996)).

333. See, e.g., Patten, *supra* note 294, at 259 (“Not all cultures or communities delegate or assume child-rearing responsibilities based on blood relations. Where a family has demonstrated a commitment to a child and she is bonded to that family, it is incumbent upon agencies and courts to respect those affective bonds.”).

334. For example, “the Tlingit and Haida tribes traditionally define family broadly. Alaska Native tribes do not limit the definition of family to blood-ties or marriage links; family includes communal relationships within the tribe.” Laverne F. Hill, *Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children Under the Indian Child Welfare Act*, 22 ALASKA L. REV. 89, 95 (2005); see also Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 442 (2014-2015) (“Before formal enrollment rules, membership in a tribal community was based on kinship, residence, and sometimes choice of affiliation.”).

335. Jeffrey A. Parness & Amanda Beveroth, *The ICWA’s Pre-Existing Custody Requirement: A Flexible Approach to Better Protect the Interests of Indian Fathers, Children, and Tribes*, 35 CHILD. LEGAL RTS. J. 25, 37 n.144 (2015) (noting “the emphasis Congress placed on tribal culture, where an Indian child may have a close relationship with extended family members, who could provide care to the child while maintaining the child’s relationship with the tribal community”); see also Indian Child Welfare Act of 1978, 25 U.S.C. § 1901(5) (noting the need for ICWA was due to the fact that state “failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families”).

336. Who May Adopt, 19 GUAM CODE ANN. § 4203 (2020).

337. See, e.g., ARIZ. REV. STAT. § 8-103 (LexisNexis 2016); DEL. CODE ANN. tit. 13, § 903 (2019); FLA. STAT. ANN. § 63.207 (LexisNexis 2003); GA. CODE ANN. § 19-8-3

State courts have upheld these preferences and explained the benefits of keeping children in state. For example, in *Adoptive Parents v. Biological Parents*,³³⁸ the South Carolina Supreme Court upheld restrictions on non-resident adoptions, explaining that such restrictions help the state protect its children from the dangers of “baby selling.”³³⁹ Similar reasoning was used to uphold Rhode Island’s residency requirement. In *In re Jeramie N.*, the Rhode Island Supreme Court upheld residency requirements imposed on private adoptions and explained that such requirements allow the state to protect children’s best interest and ensure “children are not “sold to the highest bidder and shuffled around like objects on an auction block.””³⁴⁰ The Indiana Supreme Court has also used similar reasoning. As the court explained in *In re Adoption of Infants H.*, “Residency does matter as respects the delicate question of adopting a child . . . [because] it is more

(2018); IDAHO CODE § 16-1501 (2014); 750 ILL. COMP. STAT. ANN. 50/2 (LexisNexis 2015); IND. CODE ANN. § 31-19-2-2 (LexisNexis 2007); KY. REV. STAT. ANN. § 199.470 (LexisNexis 2018); MINN. STAT. ANN. § 259.22 (West 2013); N.M. STAT. ANN. § 32A-5-11 (LexisNexis 1993); OR. REV. STAT. § 109.309 (2003); 15 R.I. GEN. LAWS § 15-7-4 (1998); S.C. CODE ANN. § 63-9-60 (2018); TENN. CODE ANN. § 36-1-115 (2018); VA. CODE ANN. § 63.2-1201 (2017); WIS. STAT. ANN. §§ 48.82, 882.01 (West 1991); WYO. STAT. ANN. § 1-22-103 (1986); CHILD WELFARE INFO. GATEWAY, CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., WHO MAY ADOPT, BE ADOPTED, OR PLACE A CHILD FOR ADOPTION? 2 & n.6 (Jan. 2020), <https://www.childwelfare.gov/pubPDFs/parties.pdf> (noting requirements for the Northern Mariana Islands, Puerto Rico, and Virgin Islands). In these states, “the required period of residency ranges from 60 days to 1 year.” *Id.* However, some of these states make exceptions for non-residents under certain circumstances. For example, in Indiana and South Carolina, a nonresident can adopt a child with special needs; “in Illinois, Mississippi, New Mexico, and Rhode Island, a nonresident may adopt through an agency”; and Illinois, Tennessee and South Carolina all make exceptions for members of the military. *Id.* “Some states make exceptions to the residency requirements for members of the military.” *Id.*; see also S.C. CODE ANN. § 63-9-60 (2018) (excepting military personnel stationed in South Carolina).

338. 446 S.E.2d 404 (S.C. 1994).

339. *Id.* at 407, 410–11.

340. 688 A.2d 825, 830 (R.I. 1997). In addition, the Interstate Compact on the Placement of Children was created specifically because states recognized the dangers of placing children out of state due to the home state’s limited ability to continue to monitor that child’s safety. See, e.g., Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 296 (1989) (“The ICPC was intended to extend the jurisdictional reach of a party state into the borders of another party state for the purpose of investigating a proposed placement and supervising a placement once it has been made.”).

difficult for an Indiana court to evaluate whether adoption by a non-resident is in a child's best interest.”³⁴¹

As the courts in the above cases understood, it is much easier for a community to protect its children when the children remain within its jurisdiction. Tribal governments share this desire to keep an eye on their children and ensure they are protected and well cared for.³⁴² The ICWA's tribal placement preference simply ensures tribes, have the same ability as states to safeguard their children.³⁴³

d) Open Adoptions

The ICWA's tribal placement preference keeps Indian children connected to their tribal communities—regardless of whether the child's birth parents believe this connection is in the child's best interest. In voluntary adoptions, this means the placement wishes of a fit custodial parent can be overridden. The ICWA's critics claim this is unusual³⁴⁴ and note that fit custodial parents should have the right to make decisions

341. 904 N.E.2d 203, 206 (Ind. 2009).

342. In addition, such restrictions are common in the international context. Many countries give preference to citizens and some completely prohibit their citizen children to be adopted by non-citizens. *See generally* Bernie D. Jones, *International and Transracial Adoptions: Toward a Global Critical Race Feminist Practice?*, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 43, 58 (2004). *See also infra* Section III.E (discussing international adoption).

343. It should also be noted that tribes have similar concerns about “baby selling” but that these concerns are alleviated by the application of the tribal placement preference. *See* Berger, *supra* note 192, at 356 (noting that tribal placement preferences “will likely result in a child becoming entirely unavailable for a high-priced adoption”).

344. During a hearing in 1988 to consider amendments to the ICWA, one witness testified that the ICWA infringes on a mother's rights to “determin[e] what the best interests of the child are . . . [and] subject[s] the interests of the child to the interests of the tribe.” *To Amend the Indian Child Welfare Act: Hearings on S. 1976 Before the S. Select Comm. on Indian Affs.*, 100th Cong. 48 (1988), <https://narf.org/nill/documents/icwa/federal/lh/hear051188/hear051188.pdf> (testimony of Ross Swimmer, Asst. Sec' for Indian Affairs, Dep't of the Interior); *see also* Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 568 (1996) (“The ICWA permits tribes and courts to blatantly disregard a natural parent's deliberate and thoughtful decision to have their child adopted by a specific family of their choice. Even more frightening is the fact that under the ICWA courts and tribes can disregard a parent's conscious decision not to have their child raised in the same social setting to which they belong.”).

regarding the care and control of their children.³⁴⁵ In general, this is true, but this right is not absolute and may be infringed to protect the health and welfare of the child.

The ICWA applies to both involuntary and voluntary adoptions because Congress determined Indian children would continue to be harmed if voluntary adoption provided an exception to the Act.³⁴⁶ Congress recognized that Indian children benefit from a connection to their tribes and relatives. The growth of open adoption laws supports this conclusion.

The ICWA is premised on the belief that it is in the best interests of Indian children to remain connected to their families and tribes.³⁴⁷ The tribal placement preferences help ensure that even if children cannot be placed with a relative, they will remain connected to their tribal culture and

345. For cases discussing a parent's constitutionally protected right to raise a child free from governmental intrusion, see *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

346. ICWA applies to both because Congress recognized that voluntary placements could otherwise be used as a way to circumvent the Act. See H.R. REP. NO. 95-1386, at 11 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7533 (anticipating the dangers posed by voluntary actions) ("[T]he voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children."). For a compelling disclosure of the use of voluntary adoptions by private adoption agencies as a device to place Native children outside the Native American community, see *Oversight Hearings on the Indian Child Welfare Act: Before the S. Select Comm. on Indian Affs.*, 100th Cong. 362-66 (1987), <https://narf.org/nill/documents/icwa/federal/lh/hear111087/hear111087.pdf> (stating that private adoption agencies in Alaska "consistently show an utter disregard for the Indian Child Welfare Act and the values it embodies" and that the Alaskan agencies "are in the adoption business"); see Erik W. Aamot-Snapp, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1196 (1995); see also *Oversight on the Implementation of the Indian Child Welfare Act of 1978: Hearing Before the S. Select Comm. on Indian Affs.*, 98th Cong. 107-08 (1984) (statement of Ethel C. Krepps, President, Okla. Indian Child Welfare Ass'n) (describing an affidavit used by independent adoption agencies to bypass the ICWA).

347. Open adoption is similar to the long-standing tribal practice of customary adoption. [T]ribal customary adoption (TCA), is a legal adoption where the adopting parents receive all the rights any other adoptive parent would, but where TPR does not occur. California, Minnesota, and Washington have laws recognizing and requiring TCAs to be an option in pursuing permanent placement for Indian juveniles. If the government is seeking to alleviate the negative impacts of TPRs on children and their families, customary adoptions should be a permanent option for all juveniles.

Polasky, *supra* note 182, at 403.

heritage. The goal of open adoption is similar.³⁴⁸ Open adoptions seek to keep children connected to their birth communities and culture.³⁴⁹

Studies show that most adoptees want to have some contact with their birth parents³⁵⁰ and that contact strongly contributes to adoptees' well-being.³⁵¹ Specifically, such studies indicate that post-adoption contact helps children avoid feelings of conflict between their birth families and adoptive families,³⁵² helps them resolve identity struggles,³⁵³ reduces anxiety about

348. See Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, CHILD. LEGAL RTS. J., Fall 1998, at 24, 42 n.2 [hereinafter Appell, *Increasing Options*] (defining open adoption as "a broad and flexible concept encompassing a spectrum of relationships that range from preadoption [sic] exchange of information among the birth and adoptive parents to ongoing postadoption contact between the birth family and the adoptive family"). It is also important to note that while open adoptions are a relatively recent development in American family courts, there is a long-standing tradition of open adoption in many tribal communities. See, e.g., Atwood, *Flashpoints*, *supra* note 89, at 670 ("In this regard, state courts would do well to learn from their tribal counterparts in designing placements for children that avoid the head-to-head collision of interests.").

349. One of the additional benefits of open adoption is that by ensuring adoptive parents have contact with birth parents or relatives makes them less likely to think poorly of the child's birth relations, and thus avoid "perceptions that the child may absorb as negative messages about the child's worth or that might produce cognitive dissonance for the child who has loyalties to the birth family." Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1, 7 (2010) [hereinafter Appell, *Reflections*].

350. "This study indicated that: 'having contact is generally associated with satisfaction with that contact; not having contact is generally associated with dissatisfaction about not having contact . . .'" Maldonado, *Permanency*, *supra* note 265, at 327 (quoting Tai J. Mendenhall et al., *Adolescents' Satisfaction with Contact in Adoption*, 21 CHILD & ADOLESCENT SOC. WORK J. 175, 186 (2004)).

351. "[O]ne longitudinal study of children adopted as infants concluded 'that ongoing contact with a birth parent contributes to [children's] overall well-being as they grow up.'" Maldonado, *Permanency*, *supra* note 265, at 327 (quoting Joan Heifetz Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, in FAMILIES BY LAW: AN ADOPTION READER 159, 159 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004)) (alteration in original); see also Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163, 178 (2015) ("[T]he growing body of research paints a positive picture of how well open adoptions of various forms tend to work for their participants.") (quoting DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 16 (2012)).

352. Maldonado, *Permanency*, *supra* note 265, at 328; see also Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 322 (2012) ("Adoptive parents are also understood to benefit from the arrangement. As already noted,

their birth families,³⁵⁴ and enables children to address feelings of rejection.³⁵⁵ Studies also suggest that post-adoption contact may be especially important in transracial adoption.³⁵⁶

The similarities between open adoption and the tribal placement preference are most strongly exemplified by the fact that the availability of open adoptions has repeatedly been used as good cause for deviating from the Act's placement preferences. For example, in the Minnesota adoption case of Christian Good Bird, the mother initially objected to her son's adoption by a non-Indian couple he had been living with since birth.³⁵⁷ The child's tribe also intervened to contest the adoption.³⁵⁸ The result was a highly contentious two-year custody battle.³⁵⁹ This case, however, was

the practice of open adoption is understood to contribute to an ongoing supply of desirable newborns. Open adoption may also benefit the adoptive parents and their child from a developmental perspective. The adoptive parents accept, as evidenced by their willingness to open adoption, that transparency about origins is good for their child and that it will not threaten their own status as legal parents.”).

353. Contact can enable children to incorporate birth-families into their identity. See Sanger, *supra* note 352, at 322.

354. Appell, *Reflections*, *supra* note 349, at 22 (“Children’s accounts of their feelings about adoption and contact suggest that, for most of them, their everyday lives were not clouded by a significant sense of loss. However, when we asked them if they ever worried about anything[,] thirty-six (61 per cent) children identified issues associated with adoption or their birth families Direct contact went some way towards quelling these worries for many children and adoptive parents were aware of its importance in this respect.”) (alterations in original) (quoting CAROLE SMITH & JANETTE LOGAN, *AFTER ADOPTION: DIRECT CONTACT AND RELATIONSHIPS* 144 (2004)).

355. Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, *FUTURE CHILD.*, Spring 1993, at 119, 122 (noting that one of the benefits of open adoptions is that “adoptees’ feelings of rejection by the birthparents also can be greatly diminished”).

356. Open adoption can help provide adopted children with same-race role models who can help with racial identity formation. See Seymore, *supra* note 351, at 179; see also Barbara Yngvesson, *Negotiating Motherhood: Identity and Difference in “Open” Adoptions*, 31 *LAW & SOC’Y REV.* 31, 67–76 (1997) (exploring the practice of “other” mothering in African American communities).

357. Ronald M. Walters, Comment, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 271 (2008); see also *In re Adoption of Baby Boy J.*, 944 N.Y.S.2d 871, 877 (N.Y. Sur. Ct. 2012) (using a post adoption contract agreement as part of its determination that “good cause exists to deviate from the preferences set forth in [the] ICWA”).

358. Walters, *supra* note 357, at 272.

ultimately resolved when the non-Indian adoptive couple agreed to sign a “cultural connectedness agreement” obligating them “to establish and maintain contact with [the child’s] Tribal culture and his extended family.”³⁶⁰ The court determined that this promise was sufficient “good cause” to permit deviation from the ICWA’s placement preference.³⁶¹

Indian law scholars, such as Professor Barbara Atwood, have long recognized the potential benefits of permitting open adoption to serve as good cause to deviate from the placement preferences. As Professor Atwood explains, continued contact agreements “allow state courts to fashion remedies that accommodate the child’s interest in remaining with psychological parents while maintaining ties with her cultural community. Through continued contact, the child’s identity as a member of the tribe would remain vital, thus benefiting the child as well as the tribe.”³⁶²

Historically, the biggest hurdle to permitting open adoption to constitute “good cause” for deviating from the placement preference was that open adoption agreements were frequently unenforceable. For example, in the 2008 case *In re Jesse*, the Choctaw Nation was amenable to permitting an

359.

Christian’s adoptive parents appeared on Dr. Phil after a judge had ordered them to return Christian to his mother in 45 days. *Dr. Phil: Adoption Controversy* (CBS television broadcast Jan. 28, 2005) (transcript on file with the author). While the Hofers were still expecting that they would have to return Christian, Dr. Phil suggested that the situation might best be resolved extrajudicially. The litigation settled soon thereafter.

Id. at 270 n.2.

360. *Id.* at 272.

361. The *Goodbird* case is not unique. See, e.g., *Baby Boy J.*, 944 N.Y.S.2d at 877 (using a post adoption contract agreement as part of its determination that “good cause exists to deviate from the preferences set forth in [the] ICWA.”); *In re Adoption of F.H.*, 851 P.2d 1361, 1363 (Alaska 1993) (citing the “‘open adoption’ petition allowing E.P.D. access to F.H. and possibly giving F.H. exposure to her Native American heritage”); see also *Native Vill. of Napaimute Traditional Council v. Terence W.* (*In re Adoption of Keith M.W.*), 79 P.3d 623, 631 (Alaska 2003) (finding that reliance on adoption structure can serve as part of the basis for finding good cause to deviate from the Act’s placement preferences); Jeff O. v. Ariz. Dep’t of Econ. Sec., No. 1 CA-JV 11-0019, 2011 WL 3820513, at *7 (Ariz. Ct. App. Aug. 30, 2011) (citing “[t]he open adoption/relationship between the placement and biological parents and extended family” as part of its good cause determination).

362. Atwood, *Flashpoints*, *supra* note 89, at 670 (describing the Indian Child Welfare Act Amendments of 2001, H.R. 2644, 107th Cong. (2001)). The revisions “would authorize state courts to approve of post-adoption visitation agreements as part of an adoption decree” and these agreements “would grant enforceable rights of visitation or contact with the child by birth parents, extended family members, or a child’s tribe.” *Id.* at 669.

open adoption to serve as “good cause” to deviate from the preferences, but the agreement fell through when the child’s birth father informed the Tribe that there was “no such thing as an open adoption in California.”³⁶³ Today, that is no longer the case.³⁶⁴ California’s current law permits post-adoption contact agreements and assumes such contact may be beneficial for all adopted children. The provision also specifically includes tribal contact. It states:

The Legislature finds and declares that some adoptive children may benefit from either direct or indirect contact with birth relatives, including the birth parent or parents . . . or an Indian tribe, after being adopted. Postadoption contact agreements are intended to ensure children of an achievable level of continuing contact when contact is beneficial to the children and the agreements are voluntarily executed by birth relatives, including the birth parent or parents . . . or an Indian tribe, and adoptive parents.³⁶⁵

California is not alone. Over the past twenty years, many states have “revised their statutory schemes regarding open adoption”; the majority provide “for some form of enforceable agreement between birth parents and

363. *In re Jesse E.*, No. B200426, 2008 WL 651692, at *11 (Cal. Ct. App. Mar. 12, 2008).

364. This view changed in the 1980s, when courts began to take account of developing shifts in law and in sentiment regarding open adoption, and they began to reassess the nonenforceability of visitation agreements. Most of the cases from the period involved mothers who had existing relationships with their children prior to the adoption; the adopted children were children, not newborns, who had lived with their birthmothers for some time.

Sanger, *supra* note 352, at 316. This reasoning is now being applied to the adoption of infants as well as older children. Today, most statutes apply to any adopted child but there remain some exceptions. For example, “Connecticut and Nebraska permit visitation only with children adopted from foster care; while Indiana limits coverage to foster children who are two and over.” *Id.* at 319 (citing CONN. GEN. STAT. ANN. § 45a-715 (West 2004); IND. CODE ANN. § 31-19-16.5-1 (West 2008); NEB. REV. STAT. ANN. § 43-162 (LexisNexis 2011)).

365. CAL. FAM. CODE § 8616.5(a) (West 2017). It is also telling that the California law does not only pertain to birth parents but also provides for information sharing with extended relatives.

adoptive parents.”³⁶⁶ In fact, as Professor Carol Sanger notes, “[M]ost adoptions in the United States are now open in some respect.”³⁶⁷ Moreover, while all open adoption statutes include the birth parents, several include other birth relatives, such as siblings, grandparents, aunts, uncles, foster parents, and some states—like California—specifically include members of an Indian child’s tribe.³⁶⁸

The inclusion of Indian tribes in open adoption statutes is significant. States with these provisions recognize the similarity between open adoption and tribal preference. Both keep children connected to their birth families and communities, but that is not the only similarity between the ICWA’s tribal preference and open adoption. In fact, the most important parallel between open adoption and tribal preference may be that both can be imposed against the wishes of the child’s parents.³⁶⁹

366. Sanger, *supra* note 352, at 319 (“By 2011, twenty-six states and the District of Columbia had enacted laws providing for some form of enforceable agreement While the statutes differ in interesting ways, each provides that postadoption visitation agreements are legal so long as the agreement is in writing and approved by the court, most often by being incorporated into the final order of adoption. The statutes also specify the type of contact to which the parties may agree. These include actual visitation, the sharing of information (identifying or non-identifying), and other forms of communication, such as letters and photographs. Information may be exchanged directly or through an adoption agency.”).

367. *Id.* at 321 (“[O]pen adoption is now a familiar and expected part of adoption practice and culture.”); see also Appell, *Increasing Options*, *supra* note 348, at 4 (“Open adoption has now become the norm in practice for all types of adoption.”).

368. See CAL. FAM. CODE § 8616.5(b)(1) (“Nothing in the adoption laws of this state shall be construed to prevent the adopting parent or parents, the birth relatives, including the birth parent or parents . . . or an Indian tribe, and the child from voluntarily executing a *written agreement* to permit continuing contact between the birth relatives, including the birth parent or parents” (emphasis added)); see also Sophie Mashburn, Comment, *Mediating A Family: The Use of Mediation in the Formation and Enforcement of Post-Adoption Contact Agreements*, 2015 J. DISP. RESOL. 383, 388 (“California, Minnesota, and Oklahoma, children adopted from an Indian tribe are allowed continued contact with members of that tribe if they have a pre-existing relationship with the tribe from which they were adopted.”).

369. Annette R. Appell, *Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact*, 4 ADOPTION Q. 101, 101 (2000) [hereinafter Appell, *Enforceable*]; see also Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1040 (1995) (noting that some courts have ordered post adoption contact over adoptive parents’ objections); *In re Adoption of Vito*, 728 N.E.2d 292, 300 (Mass. 2000) (citing Massachusetts law permitting the court to order visitation regardless of the wishes of the parties).

Several states have court-imposed post-adoption contact statutes that empower courts to order visits at the request of third parties and over the objections of the adoptive parents.³⁷⁰ As Professor Annette Appell notes, such orders “can be useful, particularly when there are people important to the child, but whose importance the adoptive parents do not appreciate.”³⁷¹ Similar to the ICWA placement preferences, these statutes permit parental wishes to be ignored in order to ensure a child has contact with their birth family and community. These statutes are significant, because one of the most common criticisms of the tribal placement preferences is that they promote a child’s familial and cultural connections regardless of the birth parent’s wishes.

Court-imposed post-adoption contact is similar. Like the ICWA’s tribal placement preferences, court-imposed post-adoption contact orders assume that maintaining a child’s connection to family and community is important enough to override a biological parent’s desire to sever this connection.

4. Any Other Indian

The third ICWA placement preference gives preference to “Indian families” over any non-Indian families seeking to adopt an Indian child.³⁷² The ICWA’s critics claim this provision promotes race matching.³⁷³ As explained in Section II.E of this Article, this preference is not race-matching because “Indian” is a political, rather than racial, category.

370. See, e.g., MASS. ANN. LAWS ch. 210, § 3 (LexisNexis 2012) (stating that a court may dispense with need for consent to adoption in the best interests of a child); see also Appell, *Enforceable*, *supra* note 369, at 101–02.

371. Appell, *Reflections*, *supra* note 349, at 6. For example, . . . Massachusetts’ relatively longstanding and robust practice of court-ordered post-adoption and post-termination family contact. In fact, so rooted is this practice that the Massachusetts Supreme Judicial Court, in *Adoption of Vito*, explicitly rejected the argument that statutory amendments providing for adoption with contact and post-termination contact agreements removed the judiciary’s equitable authority to impose post-termination and post-adoption contact. It is not surprising, then, that there continues to be litigation regarding the court’s discretion to order post-adoption contact, which is limited only by the best interests of the child standard, a notoriously indefinite measure.

Id. at 12.

372. 25 U.S.C. § 1915 (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with . . . (3) other Indian families.”).

373. See *supra* Section II.E (discussing the *Brackeen* case and the plaintiff’s—and their supporters’—arguments that the ICWA is unconstitutional racial discrimination).

Regardless, even if “Indian” was a racial category, this provision would still be permissible. Despite the perception that racial considerations in child welfare are forbidden, this contention is false. There are strong arguments that race-matching is undesirable, but it is far from prohibited.

a) MEPA and the Illusion of Color Blindness

The perception that racial considerations should be barred from child placement decisions gained nationwide prominence with the passage of the Multi-Ethnic Placement Act (MEPA).³⁷⁴ The MEPA was Congress’ response to growing criticism that the preference for placing black children with black parents prevented these children from being adopted and forced them to languish in foster care.³⁷⁵ As it was originally enacted, the MEPA prohibited officials from delaying or denying the placement of a child “solely on the basis of race.”³⁷⁶ The “solely” language led to public outcry that the statute did not go far enough and, in 1996, Congress amended the MEPA to remove the “solely” language.³⁷⁷

The passage of the MEPA and its amendments created the perception that race-matching is both harmful and prohibited; yet, it remains legal and widespread. The most common example of modern race-matching is “facilitative accommodation,” the policy of considering a potential adoptive couple’s racial preference.

b) Facilitative Accommodation

“Facilitative accommodation” refers to the practice of categorizing children by race and placing them with parents according to the adoptive parents’ racial preference.³⁷⁸ Facilitative accommodation occurs in both

374. 42 U.S.C. § 5115a (1994) (repealed 1996).

375. Ralph Richard Banks, *The Multiethnic Placement Act and the Troubling Persistence of Race Matching*, 38 CAP. U. L. REV. 271, 272 (2009) [hereinafter Banks, *Multiethnic Placement Act*]. It should be noted that MEPA has not succeeded in its goals of creating equality in adoption rates. *Is MEPA/TEP Working for African American Children?*, 27 CHILD L. PRAC. 79 (2008) (“Adoption rates of African American children remain lower than those of other racial/ethnic groups.”).

376. *Id.* (quoting 42 U.S.C. § 5115a(a)(1)(A)–(B) (1994) (repealed)). This language permitted child placement decisions in which race was one factor among many, ironically making MEPA the first federal statute to condone race matching.

377. Banks, *Multiethnic Placement Act*, *supra* note 375, at 272–73.

378. For an example of how race matching works, see Banks, *Multiethnic Placement Act*, *supra* note 375, at 275–76 (describing South Carolina’s policy which asked parents if they

private adoptions, which do not receive federal funds and are not subject to the MEPA, and in public adoptions, which are subject to the MEPA.

c) Private Adoptions

In private adoptions, race-matching is open and notorious. As Professor Dov Fox notes, “Some private agencies still openly make placement decisions based primarily on race and prominently highlight the racial backgrounds of adoptive children in online advertising and other promotional materials, while charging higher fees to adopt white children than black ones.”³⁷⁹ This practice is compounded by the fact that, over the past four decades, the cost of adoption skyrocketed. “Estimates in the late 1980s put the average agency fee between \$7,000 and \$10,000.”³⁸⁰ By 2015, many agencies were charging more than \$50,000 per adoption and added substantial additional fees for facilitating the adoption of Caucasian children.³⁸¹

Many scholars have criticized these racial premiums. As Professor Margaret Radin notes, pricing adoptions based on race creates both a literal and a rhetorical market in which there exists inferior and superior children.³⁸² Similarly, Professor Michele Goodwin notes that “altruism as a primary goal in adoption has been overshadowed by supplication to

were willing to “accept children who are Black, White, Black/White, or Other” and then used these answers to determine a child’s potential placement).

379. Dov Fox, *Race Sorting in Family Formation*, 49 FAM. L.Q. 55, 60 (2015) (citing Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 27–30 (2003)); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1423 (2006); Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. REV. 1687, 1696–97 (2010); Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 65–66 (2006); Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 248 (2009).

380. Jack Darcher, *Market Forces in Domestic Adoptions: Advocating A Quantitative Limit on Private Agency Adoption Fees*, 8 SEATTLE J. SOC. JUST. 729, 737 (2010).

381. *Id.*

382. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 156 (1996) (“[P]ersons . . . possess objects that they may control or manipulate to achieve their ends Objectification is improper treatment of persons because it makes them means, not ends As means, objects may be bought and sold in markets, to achieve satisfaction of persons’ needs and desires. Objects, but not persons, may be commodified.”); see also Darcher, *supra* note 380, at 745 (“When a baby or child is objectified, all of its attributes—sex, race, hair color, predicted intelligence, predicted height—become part of its ‘worth.’”).

parental desires.”³⁸³ Despite such criticisms, today’s adoption market remains a highly racialized one.

Adoption agencies establish fees with adoptive parents based on racial and other characteristics these parents find most desirable.³⁸⁴ In the U.S., white children or other lighter skinned children are more highly valued than black children and command a higher price.³⁸⁵ As Professor Jessica Dixon Weaver explains, “In many ways the process of adoption reinforces the privilege and status representative of the potential parent’s identity. Potential adoptive parents can choose what race child they are willing to raise, yet the average child awaiting adoption, regardless of ethnicity, is unable to state a racial preference.”³⁸⁶

There are multiples reasons to criticize an adoption system that accommodates potential parents’ racial preferences and objectifies children. Nevertheless, race-matching in private adoptions remains both legal and common.³⁸⁷

383. Goodwin, *supra* note 379, at 75.

384. *Id.* at 68–69.

385. *Id.* (“In U.S. adoptions, white children are more highly valued than black children by both adoption agencies and by those who seek to adopt them. Further, adoptive parents are acutely aware that competition is involved in free-market adoptions. Thus, those serious about adopting a white baby, and with the resources to do so, realize balking at the high costs associated with those adoptions would prove futile.”).

386. Weaver, *supra* note 274, at 175.

387. Some states have attempted to combat the market in babies by enacting laws intended to curb the profit of private adoption.

For example, the UAA forbids the exchange of money or any items of value for the express placement of a minor for adoption. The UAA also explicitly forbids any payment for the birth parents’ consent or relinquishment. However, the act does allow payment to agencies for their services in connection with the adoption, including those incurred in locating the child—such as advertising costs. More importantly, it allows for several categories of compensation to the birth parents: (1) the medical, pharmaceutical, and traveling expenses incurred by the birth mother in connection with the birth (or any illness to the child); (2) any counseling services for the parent(s) for a reasonable time before or after the adoption placement; (3) living expenses for the mother within a reasonable time before the birth and for no more than six weeks after the birth; and (4) any legal costs incurred by the birth parents.

Darcher, *supra* note 380, at 749. Consequently, it is not hard to get around these prohibitions.

d) Public Adoptions

Public adoptions are governed by the MEPA, but the statute's applicability doesn't prevent race-matching. States continue to use racial preferences when determining potential placements for children in state care, and children who do not match the prospective parent's preferred race are not listed as potential matches.³⁸⁸ Consequently, two decades after the MEPA's passage, a child's probability of being adopted remains strongly affected by his or her race; for African American children, this means a significantly lower likelihood of adoption.³⁸⁹ In their study on race-matching in adoption, Mariagiovanna Baccara, Allan Collard-Wexler, Leonardo Felli, and Leeat Yariv demonstrated that "children's aggregate probability of receiving an application is considerably affected by their race" and that "the probability that a 100 percent African American [baby] (of unknown gender) receives an application is 1.8 percent in contrast to a probability of 13.1 percent for a 0 percent African American child."³⁹⁰

Professor Ralph Richard Banks is one of the most vocal critics of facilitative accommodation and believes it is just as harmful as prohibited forms of race-matching.³⁹¹ Still, such views remain rare.³⁹² Courts and legislatures do not consider facilitative accommodation harmful.³⁹³ As a

388. See Banks, *Multiethnic Placement Act*, *supra* note 375, at 275–76; see also Fox, *supra* note 379, at 60 (noting adoptive parents' racial preferences in adoption is given significant weight) ("Even in public agencies, however, social workers use the broad discretion afforded them to facilitate through quiet practice the very kind of race-matching that MEPA bars them from imposing."); see also RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 134 (2001) (noting that even after MEPA, "agencies could consider the attitudes and preferences of prospective parents to decide whether placement was in a child's best interest").

389. Mariagiovanna Baccara et al., *Child-Adoption Matching: Preferences for Gender and Race*, 6 AM. ECON. J.: APPLIED ECON. 133, 153 (2014)).

390. *Id.*

391. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998) (asserting that race preferences in adoption are damaging because they limit the possibility of adoption and arguing in favor of a non-accommodation policy that would preclude adoption agencies from facilitating these racial preferences).

392. See, e.g., Maldonado, *supra* note 379, at 1470 ("Although there is a vast literature condemning race-matching practices, only recently have scholars begun to view adoptive parents' racial preferences as problematic.").

393. For example, when states are found to have violated MEPA it tends to be for denying a parent's racial preferences as in the case of parents willing to adopt transracially rather than for abiding by it. See Schlueter, *supra* note 378, at 271 ("DHHS found illegal the

result, states prohibit racial considerations that delay or deny an adoption, but most allow other racial considerations. For example, Missouri law states that “[p]lacement of a child in an adoptive home may not be delayed or denied on the basis of race, color or national origin.”³⁹⁴ Yet, the law also accommodates race-matching through the “diligent recruitment of potential adoptive homes that reflect the ethnic and racial diversity of children in the state for whom adoptive homes are needed.”³⁹⁵ Similarly, both Vermont and New Jersey prohibit an agency from racially discriminating in the adoptive parent selection process but allow agencies to consider race when determining the best placement for a child.³⁹⁶ In Connecticut and Michigan, agencies are simply prohibited from making placement decisions “solely” based on race³⁹⁷ and, in Kentucky, race-matching is facilitated through a

[South Carolina] agency’s practice of treating transracial adoptions with greater scrutiny, faulting, for example, the inquiries into prospective parents’ ability to adopt transracially, and ability to nurture a child of a different race, as well as inquiries into the racial makeup of such parents’ friends, neighborhoods, and available schools.”) (quoting Elizabeth Bartholet, Commentary, *Cultural Stereotypes Can and Do Die: It's Time to Move on With Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY L. 315, 316 (2006)); see also Eyer, *supra* note 247, at 580 n.201 (“Since MEPA was amended in 1996, only two courts have addressed the constitutionality of relying on race in adoptive or foster care placements, with opposite results.”). Eyer compared *In re Andrea Lynn Carpenter*, 1999 Mich. App. LEXIS 2140, at *8–10, n.3 (Mich. Ct. App. Dec. 3, 1999), in which the court found “the trial court’s reliance on race was constitutionally unproblematic where race was not the sole consideration,” with *Kenny A. v. Perdue*, 2004 U.S. Dist. LEXIS 27025, at *21–22 (N.D. Ga. Dec. 11, 2004), in which the court allowed “a claim of unconstitutional racial discrimination, in a case where the circumstantial evidence supported the conclusion that the agency had a virtually categorical policy of race-matching, to survive summary judgment . . .” *Id.*

394. MO. ANN. STAT. § 453.005(3) (West 2014)

395. *Id.* § 453.005(2).

396. See VT. STAT. ANN. tit. 15A, § 2-203(d) (West 1997) (“A preplacement evaluation shall contain the following information about the person being evaluated:(1) age and date of birth, nationality, racial or ethnic background, and any religious affiliation.”); see also N.J. STAT. ANN. § 9:3-40 (West 2006) (“[A]n approved agency shall not discriminate with regard to the selection of adoptive parents for any child on the basis of age, sex, race, national origin, religion or marital status provided, however, that these factors may be considered in determining whether the best interests of a child would be served by a particular placement for adoption or adoption.”).

397. “[T]he commissioner or such agency shall not refuse to place or delay placement of such child with any prospective adoptive parent solely on the basis of a difference in race, color or national origin.” CONN. GEN. STAT. ANN. § 45a-726(a) (West 2000); MICH. COMP. LAWS ANN. § 722.957 (West 1995) (“[A]n adoption facilitator shall not refuse to provide services to a potential adoptive parent based *solely* on age, race, religious affiliation,

statute permitting genetic parents to disapprove a placement for any reason and without any explanation.³⁹⁸

The above laws comply with the MEPA, which simply prohibits agencies from delaying or denying an adoptive placement based on race.³⁹⁹ They are also consistent with the Supreme Court's decision in *Palmore v. Sidoti*, which held only that race may not be the sole factor in determining the best interests of the child for purposes of custody.⁴⁰⁰ *Palmore* prohibits courts from relying exclusively on race and racial concerns as the basis for their decisions, but it does not prohibit racial considerations in general.⁴⁰¹ *Palmore* is a very low standard. Professor Katie Eyer notes that "only the most unsophisticated government actor would be unable to demonstrate compliance" with *Palmore*.⁴⁰² As a result, race is a permissible and common consideration in custody decisions.⁴⁰³

Tellingly, objections to the use of race in custody decisions is primarily confined to the cases where a potential adoptive couple is prevented from adopting a different race child when no same-race parent is available. As Professor Banks wrote:

disability, or income level. A child placing agency shall not make placement decisions based solely on age, race, religious affiliation, disability, or income level.") (emphasis added).

398.

The cabinet may refuse to approve the placement of a child for adoption if the child's custodial parent is unwilling for the child to be placed for adoption with the proposed adoptive family. The cabinet may approve or deny the placement, in spite of the fact that the custodial parent or parents are unwilling to be interviewed by the cabinet or other approving entity

KY. REV. STAT. ANN. § 199.473 (West 2018).

399. In facilitative adoption the denial of the placement is based on the prospective parents' decision not the agency's. However, the decision to accommodate parental preferences, which are primarily for white children, arguably delays and may even deny a placement based on race. Leigh, *supra* note 72, at 396 ("By the child-placing agency helping parents exclude children of other races, it is actually delaying the adoption of minority children by making it easier for these minority children to be overlooked, and in turn, not be adopted in a timely manner.").

400. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

401. *See id.* at 432–34.

402. Eyer, *supra* note 247, at 575.

403. *Gloria G. v. State Dep't of Soc. & Rehab. Servs.*, 833 P.2d 979, 984 (Kan. 1992) (finding that race could be used as a factor in adoption decisions if it is not the sole factor); *In re Adoption/Guardianship No. 2633*, 646 A.2d 1036, 1036 (Md. Ct. Spec. App. 1994) (affirming circuit court's holding that "determination that placement of child with same race family was in best interest of child was not abuse of discretion").

I often raise this issue in my family law class by asking the students to imagine that there are black children and white children available for adoption, and that there are so many prospective parents of each race that all the children could be placed with suitable families even if none were placed across racial lines. It is striking to see how opposition to race matching diminishes once its effect is no longer to delay or preclude the adoption of some children. Many students are all too happy to race match, so long as there are enough families of each race for all the available children.⁴⁰⁴

If “Indian” is considered a race, then § 1915(c) of the ICWA permits the scenario described by Professor Banks and should elicit the same general approval. The “any other Indian” requirement preferences an Indian parent over a non-Indian parent only when both are available and qualified. A racial preference under such circumstances is not prohibited by the MEPA and, as previously noted, is frequently encouraged under state law. Consequently, the fact that these placements have garnered such fierce opposition is more likely due to adoptive parents’ desire to adopt Indian children rather than an objection to race-matching in general. The objections to race-matching in the international adoption context reveals similar motivations.

E. International Adoption

International adoptions are now commonplace in the United States.⁴⁰⁵ The United States is the number one country for international adoptions and, at its peak, in 2004, the United States accounted for nearly half of all transnational adoptions.⁴⁰⁶ However, since then, the numbers of international adoptions have been declining.⁴⁰⁷ This reduction is not due to

404. Banks, *Multiethnic Placement Act*, *supra* note 375, at 287.

405. See, e.g., Barbara Yngvesson, *Transnational Adoption and European Immigration Politics: Producing the National Body in Sweden*, 19 IND. J. GLOB. LEGAL STUD. 327, 331–32 (2012) (describing the United States as “[t]he principal adopting nation today, as it has been for the past five decades”).

406. *Id.* (noting that the United States received 22,884 children that year).

407. See, e.g., Deleith Duke Gossett, *If Charity Begins at Home, Why Do We Go Searching Abroad? Why the Federal Adoption Tax Credit Should Not Subsidize International Adoptions*, 17 LEWIS & CLARK L. REV. 839, 857 n.118 (2013) (“Recent figures show a decline of approximately 60%, from 22,991 international adoptions in 2004 to 8,668 international adoptions in 2012.”).

a reduction in demand, which remains high,⁴⁰⁸ but is the result of increased restrictions and prohibitions on foreign adoptions.⁴⁰⁹ Not surprisingly, potential adoptive parents are often vocal opponents of these increased restrictions, many of which require racial and cultural similarities between the child and adoptive parent.⁴¹⁰

1. Adoption Prohibitions

Foreign countries frequently prohibit adoptions by persons not deemed similar enough to the potential adoptive child. In some countries, this means adoptive parents must be the same religion as the child. For example, in Tunisia and Morocco, a Muslim child may only be adopted by another Muslim⁴¹¹ and, in Bangladesh, a Hindu child may only be adopted by another Hindu.⁴¹² However, international law also permits adoption restrictions to be ethnically or culturally based. For example, the preamble

408. See, e.g., *Who Will Fill the Empty Cribs?*, NEWSWEEK (Jan. 26, 2008, 8:26 AM), <http://www.newsweek.com/id/105530>.

409. See, e.g., James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT'L L. 189, 191 (2013) (explains that the decline in adoptions is due to the fact that “many countries that have been major ‘sending countries’ have imposed new procedural and substantive restrictions on foreign adoption or have foreclosed the practice altogether.”); Linda D. Elrod & Robert G. Spector, *Review of the Year 2015-2016 in Family Law: Domestic Dockets Stay Busy*, 50 FAM. L.Q. 501, 514 (2017) (“International adoptions have declined partly because of the Hague Convention on Cooperation with Respect to International Adoption and because several countries, including Russia, Romania, and Guatemala, have ended adoption programs or have diminished numbers of children available.”).

410. See Elizabeth Bartholet, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*, 55 N.Y. L. SCH. L. REV. 781, 782 (2010–11) (arguing against adoption restrictions to help increase international adoptions); Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to Be Adopted*, 55 N.Y. L. SCH. L. REV. 701, 704–05 (2010–11) (opposing restrictions on inter-country adoption).

411. See, e.g., Cantonal Court of Tunis, Decision No. 2272, Dec. 26, 1974, 1975 REVUE TUNISIENNE DE DROIT, no. 2, at 117, cited in Nadjma Yassari, *Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law*, 63 AM. J. COMP. L. 927, 946 n.130 (2015); *Morocco Adoption*, RAINBOW KIDS: ADOPTION & CHILD WELFARE ADVOC., <https://www.rainbowkids.com/international-adoption/country-programs/morocco> (last visited Sept. 14, 2020).

412. See SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW AND THE FAMILY app. G (2020 ed.), IMLF APP G (Westlaw) (“Laws of Selected Foreign Countries on Adoptions”).

to the Convention on the Rights of the Child⁴¹³ asserts that the parties to the treaty must consider the “importance of the traditions and cultural values of each people for the protection and harmonious development of the child.”⁴¹⁴ Article 8 of the Convention requires that these parties “undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”⁴¹⁵ Most importantly, Article 21 states that intercountry adoption as a means of placement is only permitted “if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”⁴¹⁶

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption⁴¹⁷ also supports international adoption restrictions based on ethnic or cultural considerations. Specifically, Article 16 states that, when considering foreign adoptions, the Central Authority of

413. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 2; *see also* Richard R. Carlson, *A Child’s Right to A Family Versus A State’s Discretion to Institutionalize the Child*, 47 GEO. J. INT’L L. 937, 978 (2016) (noting the Hague Adoption Conference has reaffirmed a principle of subsidiarity, which holds that intercountry adoption should be pursued only if a suitable family cannot be found in the child’s country of origin).

414. Convention on the Rights of the Child, *supra* note 413, at 2.

415. *Id.* at 3.

416. *Id.* at 6. This may mean, as many intercountry adoption advocates note with concern, that the convention might require preference for local institutional care over an international placement. *See* Carlson, *supra* note 413, at 976 (“A more disturbing version of subsidiarity allows or even requires a state to place a child in a ‘suitable’ institution if local family placement is not possible, even if family placement *outside* the community is possible and the child is too young to have an emotional or psychological connection to the local community.”) (citing Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 379 (2007)). However, others have argued this is not the case, citing the Hague Adoption Convention, which states that a child, “for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” and recognizes “that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.” Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect to Intercountry Adoption at pmbl., May 29, 1993, S. Treaty Doc. No. 105-51, 1870 U.N.T.S. 167, <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf> [hereinafter Hague Convention].

417. Hague Convention, *supra* note 416.

the State of origin shall “give due consideration to the child’s upbringing and to his or her ethnic, religious and cultural background.”⁴¹⁸

2. *International Adoption Proponents and Race Matching*

International adoption proponents criticize international laws that prohibit or discourage cross race or cross-cultural adoptions. Ironically, these critics are also some of the biggest proponents of race-matching, at least when it comes to their own adoptive children.

The increase in American parents seeking international adoptions is a direct result of the decline in white children available for adoption in the United States. White parents unwilling to adopt from a primarily African-American adoption pool are now using international adoption to seek more racially similar children.⁴¹⁹ Foreign children who are white, or believed to be capable of passing as white, have become increasingly desired.⁴²⁰ In fact, the desire to adopt such children is so great that it nearly resulted in federal legislation conditioning U.S. aid on the increased availability of foreign children for adoption.

The proposed legislation was the Children and Families First Act (CHIFF),⁴²¹ which sought to eliminate the Hague Convention’s preference for in-country care solutions in return for U.S. aid.⁴²² Critics of the CHIFF

418. *Id.* art. 16 § (1)(b).

419. Maldonado, *supra* note 379, at 1423–26 (examining the myths surrounding domestic and international adoptions and demonstrating how racial preferences are an important factor in many adoptive parents’ decision to pursue an international adoption); *see also* Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 MICH. J. GENDER & L. 149, 159, 165–67 (2012) (noting such policies have the “effect of leaving more Black children in foster care”).

420. Pearson, *supra* note 419, at 159, 165–67.

421. S. 1530, 113th Cong.

422. CHIFF imported the “concurrent planning” concept championed by Professor Bartholet and put it on equal footing with the Hague subsidiarity principle:

The principle of subsidiarity, which gives preference to in-country solutions, should be implemented *within the context of a concurrent planning strategy, exploring in- and out-of-country options simultaneously*. If an in-country placement serving the child’s best interest and providing appropriate, protective, and permanent care is not quickly available, and such an international home is available, *the child should be placed in that international home without delay*.

DeLeith Duke Gossett, *Take Off the [Color] Blinders: How Ignoring the Hague Convention’s Subsidiarity Principle Furthers Structural Racism Against Black American*

argued that the legislation treats children as a commodity.⁴²³ Professor Deleith Gosset described the CHIFF as serving “the interests of privileged families from wealthy nations at the expense of the poorest.”⁴²⁴

Ultimately, the proposed legislation failed.⁴²⁵ However, the CHIFF fight demonstrated there is strong support for race-matching when it increases the number of white or passing-for-white children available for adoption. Indian children have often fallen into this category. Consequently, the real objection to the ICWA's third preference category, “any other Indian family,” may not be that it promotes race matching, but that it thwarts, rather than benefits, the race-matching desires of white adoptive families.⁴²⁶

IV. Conclusion

Twenty years after its enactment, it is clear the ASFA is not the panacea that was promised.⁴²⁷ State and federal policy is increasingly turning away

Children, 55 SANTA CLARA L. REV. 261, 304 (2015) (quoting 2014 CHIFF § 2475; 2013 CHIFF § 1530) (emphasis added by Gossett).

423. *Id.* at 305–06 (“Critics stated that CHIEF . . . actually aimed to tie foreign assistance to a country's willingness to participate in intercountry adoption for the benefit of Americans who want to adopt However, tying federal aid to a country's willingness to deliver its children for adoption is treating children as a commodity.”).

424. *Id.* at 306; see also Sarah Sargent, *Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX. WESLEYAN L. REV. 351, 373 (2004) (“The [Adoption Institute] report noted that the ‘market forces inherent in international adoption pose a potential threat to the welfare of children being considered for adoption, as well as their birth parents and prospective adoptive parents.’”) (quoting Evan B. Donaldson Adoption Inst., *Recommendations to the State Department & Acton Burnell Re: Implementation of the Intercountry Adoption Act 2000* (May 24, 2001)).

425. See *CHIFF Is Dead: A Post-Mortem*, LIGHT OF DAY STORIES (Jan. 11, 2015), <https://lightofdaystories.com/2015/01/11/chiff-is-dead-a-post-mortem/>.

426. The ICWA helps take wealth out of the adoption equation. See, e.g., Berger, *supra* note 192, at 356 (describing one particularly “outrageous recent case, [in which] a private adoption agency even claimed ‘good cause’ for deviation from the placement preferences after demanding that, to be eligible, any families from the child's tribe had to be able to pay the agency's \$27,500 fee”).

427.

In sum, after more than twenty years of state and federal initiatives aimed at bettering the prospects of abused and neglected children, there is no sign that those prospects have significantly improved. Children who enter foster care are at serious risk of remaining there, in unstable and impermanent placements, until adulthood. Neither intensive pre-placement services nor in-placement reunification efforts are currently adequate to provide safe and reliable homes

from the ASFA's goals of quick removals and speedy terminations and focusing on family preservation. As a result, the ICWA's provisions once again reflect state and federal child welfare policies applicable to non-Indian children. Nevertheless, while these protections are expanding for non-Indian children, their continued applicability to Indian children is threatened.

This Article has demonstrated that current ICWA challenges are unjustified.⁴²⁸ The goal of the ICWA is to protect Indian children and families by ensuring Indian children are not removed from their families without justification, aiding their return when removal was necessary, and finding them safe and loving homes when they cannot be returned. This is also the goal of non-Indian child welfare legislation. Today, more than ever, the application of the ICWA ensures Indian children are being treated the same as their non-Indian peers and, ironically, it is the ICWA challenges that pose the biggest threat to the continuation of this equal treatment.

for many children at risk. Adoptive homes are not available for many children who need them. Increased caseloads have also strained an already overtaxed system to the breaking point. Foster homes are available for less than half of the children who need temporary care, a shortfall that often leads to placement in an institution or with poorly prepared relatives.

Garrison, *supra* note 10, at 593–94.

428. In *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. Ct. App. 1995), the Court of Appeals of Texas explained that “[u]nder the ICWA, what is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family.” *Id.* at 169. Similarly, in *Chester County Department of Social Services v. Coleman*, 372 S.E.2d 912 (S.C. Ct. App. 1988), the Court of Appeals of South Carolina specifically noted, “The Act is based on the assumption that protection of the Indian child’s relationship to the tribe is in the child’s best interest.” *Id.* at 914.